United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1924.

No. 4253. **179**

OREGON BASIN OIL AND GAS COMPANY, APPELLANT,

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 26, 1924.

PRINTED DECEMBER 17, 1924.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1924.

No. 4253.

OREGON BASIN OIL AND GAS COMPANY, APPELLANT,

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	*a*	1
Amended bill of complaint	1	1
Decisions of the Secretary of the Interior	16	9
Motion to dismiss	41	23
Order granting leave to file amended bill and permitting motion to dismiss to stand against same	42	24
Order dismissing bill; appeal noted	43	24
Memorandum: $50 deposited by plaintiff's attorneys in lieu of appeal bond	44	25
Assignment of errors	44	25
Plaintiff's designation of record on appeal	47	26
Clerk's certificate	48	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1924.

Court of Appeals of the District of Columbia.

No. 4253.

OREGON BASIN OIL AND GAS COMPANY, Appellant,

vs.

HUBERT WORK, Secy., etc., et al.

a Supreme Court of the District of Columbia.

In Equity.

No. 42258.

OREGON BASIN OIL AND GAS COMPANY, Plaintiff,

vs.

HUBERT WORK, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Amended Bill of Complaint.*

Filed June 17, 1924.

In the Supreme Court of the District of Columbia.

In Equity.

No. 42258.

OREGON BASIN OIL AND GAS COMPANY, Plaintiff,

vs.

HUBERT WORK, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office, Defendants.

To the Honorable the Supreme Court of the District of Columbia, holding an equity court:

The bill of complaint of the Oregon Basin Oil and Gas Company, respectfully represents to the Court:

1. That plaintiff is a corporation, organized and existing under and by virtue of compliance with the laws of the State of Wyoming and is engaged in the business of prospecting for, developing and operating petroleum-bearing lands, and gas-bearing lands, in the state of Wyoming; that its principal office is in the town of Cody, in said State.

2. That the defendant herein, Hubert Work, is a citizen of the United States and is the Secretary of the Interior, and is here sued in that capacity; that the defendant herein, William Spry, is a citizen of the United States and is the Commissioner of the General Land Office, and is here sued in that capacity; that both of said defendants are temporarily resident in the District of Columbia.

2 3. That on or about November 8, 1911, a location was made by Ed. M. Harrison, and seven other persons, then citizens of the United States, of the Wilson No. 3 placer mining claim covering and embracing Lots numbered 1, 2, and 3, of Section numbered 5, of Township numbered 50 North, of Range numbered 100 West, and situate in the County of Park, State of Wyoming; that the act of location of said mining claim was followed by the marking of the boundaries of said claim upon the ground, and by the posting of notice of such location in a conspicuous place upon said claim, and by the filing for record in the land records of said county of a notice of such location, as required by the laws of the State of Wyoming; that thereupon said locators entered into possession of said claim and did perform work thereon for its development as a placer mining claim bearing oil or natural gas; that thereafter, and after drilling a well thereon, as hereinbelow more fully set forth, said eight persons did make a further location of said claim, on June 9, 1912, and did file notice thereof for record in the land records of said county on August 9, 1912; that at dates of said locations the land so located was unappropriated, unreserved mineral public land of the United States which was then open to such location and was and is chiefly valuable for petroleum in its various forms; that said locations were made under the provisions of the general mineral land laws of the United States, being Chapter Six, of Title XXXII of the Revised Statutes of the United States and acts amendatory thereof.

3 4. That in the month of May, 1912, a well was completed upon said land, by the locators thereof, said well having been drilled while said locators were in possession of said land under said first mentioned location; that petroleum was encountered in said well, at a depth of about 45 feet, of such amount and quality and of such manner of occurrence as to justify a reasonably prudent person in further expenditure of labor and means upon said land, with reasonable expectation of producing mineral therefrom in paying quantities.

5. That thereafter, and in the year 1913, the said owners of said placer mining claim, either acting themselves or by a lessee, did expend further money in the drilling of a second well upon said claim, to a depth of about 434 feet, cased with a steel casing, and in

which well petroleum was found in substantial quantity and of commercial quality, of which a sample was then taken, and which discovery was likewise sufficient to warrant a reasonably prudent man in further expenditure upon said claim, with expectation of developing mineral in paying quantities.

6. That in addition to performing the work hereinabove mentioned upon said placer claim, the owners of said claim did expend other money upon the building of roads necessary to the bringing in of supplies and equipment, and for the common benefit of said claim and others held in common ownership did construct bridges, camp buildings, and equipment necessary and proper for continued operations upon said claim and upon others adjacent thereto,
4 so held in common ownership; that the owners of said placer claim did continue in the prosecution of work upon said placer claim and others adjacent thereto, which were held in common ownership, for the purpose of securing a reasonable systematic and business-like development of all of the group of placer claims so held; that in operations so conducted upon said group of placer claims, the owner thereof, either directly or through a lessee, expended a large sum of money, to-wit, over two hundred thousand dollars ($200,000).

7. That long after said discoveries of petroleum were made upon said Wilson No. 3 placer claim in the years 1912, and 1913, and to-wit, by Executive order dated May 6, 1914, said described tracts were included within Petroleum Reserve No. 32, which fact is herein set forth as a part of the history of said tracts, and not because said Executive order in any manner changed the rights of the owners of said placer claim, on which wells had been drilled to discovery prior to date of said Executive order, and on which claim the owners and their grantee thereafter continued to perform the annual labor required to continue in existence their possessory title held under the mineral land laws of the United States. That the legal effect of said Executive order was merely to withdraw said lands from any subsequent location under the mineral land laws.

8. That upon some of the placer claims of said group, deeper wells were drilled, with the result that natural gas was encountered
5 in very large amounts and under such heavy pressure, that it was with great difficulty that the wells were brought under control, said deeper wells having a potential production of millions of feet of natural gas per day.

9. That by deed dated March 17, 1919, and thereafter acknowledged by said eight locators of said Wilson No. 3 placer claim at different times, and filed for record on June 6, 1919, plaintiff herein acquired for a valuable consideration all the right, title and interest of said eight locators in and to said Wilson No. 3 placer claim, and since so acquiring said title, plaintiff herein has remained and is now the owner of said placer claim.

10. That plaintiff is in the peaceable and undisputed possession of said placer claim, and its title thereto has never been drawn in question save and except by certain decisions of the Commissioner of the General Land Office and of the Secretary of the Interior, more particularly hereinafter set forth and described.

11. That at all times hereinabove mentioned, the general rule was and had been for many years followed by the Land Department of the United States in the administration of the public land laws, and especially those dealing particularly with mineral lands, that a mining location was validated, other essential factors being present, by the discovery of mineral within the located claim, where

* * * the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. * * *

6 That said rule of law was announced by the Secretary of the Interior by decision dated December 5, 1894, in the case of Castle vs. Womble, 19th Land Decisions, page 455, and was thereafter uniformly followed by the Land Department of the United States, and was repeatedly upheld and cited with approval by the courts, including the Supreme Court of the United States.

12. That at all times hereinbefore mentioned, and down to the present, it has also been a generally recognized and followed rule of evidence, laid down and recognized by the Land Department of the United States as early at least as its decision in case of Kern Oil Co. v. Clotfelter (30th Land Decisions, pages 583, 587), and decided in the year 1901, that in establishing and determining the value of land for mineral, evidence is admissible which extends to

"the discovery and development of mineral on adjacent lands, and to their geological formation."

That the same rule was announced by the Supreme Court of the United States in case of Diamond Coal & Coke Co. v. U. S., reported in 233 U. S., 236, and decided in 1914, and was also again stated by the Secretary of the Interior in case of State of Utah v. Lichliter, reported in Vol. 50 of Land Decisions, pages 231, 234, decided Jan. 10, 1924, and involving the oil character of land.

13. That after the discoveries made in the year 1912, upon said Wilson No. 3 placer claim, and upon similar discoveries upon said group of placer claims held in common ownership, as above set forth, the owners of said claims were advised by petroleum geologists
7 and engineers of the highest standing and reputation, that said discoveries did warrant and justify the further expenditure of means with a reasonable prospect of success in developing mineral in paying quantities; and the owners of said claim did actually thereafter expend further means either directly or through their lessee, in the further development of said mining claim and others of said group, with the result that petroleum was disclosed in said well so drilled on said Wilson No. 3 placer claim in the year 1913, and that thereafter still further expenditures were made upon said placer claim by said owners thereof.

14. That on February 16, 1922, plaintiff company filed in the United States Land Office at Lander, State of Wyoming, its application for a United States patent to said Wilson No. 3 placer claim,

said application being designated as Lander 013740, and did thereafter take each and every step prescribed by the statutes and departmental regulations for such cases made and provided, up to the point of payment for the land included in said placer claim, but that plaintiff was not permitted to make such payment, and the record of said application for patent was transmitted by the Lander Land Office to the Commissioner of the General Land Office for action.

15. By his decision dated May 1, 1923, the Commissioner of the General Land Office held said application for patent for rejection on the ground that the discovery of mineral upon said Wilson No. 3 placer was insufficient to form a basis of a valid mining location.

8 From that decision plaintiff herein appealed to the Secretary of the Interior, who by his decision dated October 12, 1923, affirmed the decision of said Commissioner. Thereafter plaintiff filed a petition for rehearing before said Secretary, and further evidence was submitted and further argument presented, but by decision dated February 1, 1924, said motion was denied, and the earlier decision was adhered to. That thereafter plaintiff presented to the Secretary of the Interior a petition for exercise of his supervisory authority in the premises, but that by his decision of February 21, 1924, said petition was denied. That plaintiff has exhausted all procedure open to it before the Interior Department.

16. That plaintiff files herewith, as exhibits to this bill, copies of the decisions of the Secretary of the Interior hereinabove referred to, and prays that they be considered as a part of this bill; that the first two copies are printed, the appended copies, with the official syllabus of each being taken from the current advance sheets of Volume 50 of the Land Decisions, an official publication; that the copy of decision last rendered is appended in typewritten form, not having been published.

17. That from examination of said decisions, it is apparent that the Secretary of the Interior has at no time questioned the known mineral character of the land involved, but that, on the contrary, said land has been officially designated as within the "known geologic structure of a producing oil or gas field."

9 That it further appears from said decisions that the Secretary of the Interior has not questioned the actual physical production of petroleum from the land involved.

18. That in support of its said application for patent, plaintiff filed before the Secretary of the Interior the sworn statements of numerous skilled petroleum geologists and oil producers, showing that, under the undisputed facts of this case, such a discovery as had been made by plaintiff upon its said Wilson No. 3 placer claim warranted a reasonably prudent person in further expenditure of labor and means with reasonable expectation of discovering mineral in commercially paying quantities, which evidence plaintiff alleges, was admissible as showing in proper legal manner the opinion of experts or skilled observers; but plaintiff alleges that it appears from the last rendered decision of the Secretary of the Interior, that said evidence was disregarded.

19. That plaintiff requested that said Secretary order a hearing

at which testimony might be adduced in order to establish, under cross-examination, all the material facts of the case and matter, but that by his decision rendered February 21, 1924, such hearing was denied.

20. That in so far as the determination of the presence or absence of a sufficient discovery of mineral to sustain a valid mining location may be deemed to be a finding of fact, plaintiff represents that in reaching a correct determination of the issue, it was necessary to consider the evidence, and to apply in such consideration proper rules of evidence and of law, and that, had said defendants applied said above-mentioned rule of law as to what constitutes a sufficient discovery, their decisions must have been in favor of the validity of issuing a patent thereon; that said decisions, adverse to said
10 application for patent were predicated upon error of law in that they ignored said rule of law which had become by long observance a rule of property; and that failure to follow said prior rule of law and of property constituted an arbitrary and an illegal act.

21. That unless restrained by order of this honorable court, said Secretary of the Interior, and said Commissioner of the General Land Office will forthwith proceed to carry out and execute said illegal, arbitrary and erroneous decisions above described, and will reject plaintiff's said application for United States patent to its said Wilson No. 3 placer claim, and in taking such action they will and must by necessary legal implication, do so upon the ground that plaintiff has not a valid placer mining location covering the land involved.

22. That such action would work irreparable injury and damage to plaintiff, in that it would operate to deprive plaintiff of its present possessory title to the land included in said placer mining claim, to-wit, 120.97 acres, and would leave plaintiff with no apparent title to its said claim, whereon it has expended a large sum of money in good faith. A further result would be that, under the terms of the Act of Congress approved February 25, 1920 (41 Stat. 437), commonly known as the Leasing Act, by reason of said land having been designated by the United States Geological Survey, a bureau of the Interior Department, as within the known geologic structure of a producing oil or gas field, the Secretary of the Interior could not make further disposal of the right to extract petroleum and
11 natural gas from said land save by leasing said land, upon a royalty, after competitive public bidding, under which plaintiff would be accorded no recognition of right arising from its large expenditure in developing and proving the mineral value of said land.

23. Plaintiff further represents to the Court that its grantors, the prior owners of said Wilson No. 3 placer claim, and plaintiff, as present owner thereof under said conveyance made in the year 1919, in making their large expenditures upon said placer claim rightfully relied upon the rule of law mentioned and described in Paragraph 10 hereof, as applicable to the facts of this matter, and as fully establishing the validity of said placer claim; that the action of the defendants herein is brought about by their refusal to follow said prior,

well recognized, and uniformly followed rule of law as to what constitutes such a discovery of mineral upon a mining claim as will sustain its validity.

24. That said prior rule of law was one of wide and general application, on the faith in which mining claims were located and developed, and conveyed from one owner to another, said rule thereby constituting a rule of property, which has now been ignored and in effect abrogated by said defendants, thereby in effect depriving plaintiff of its property without due process of law, contrary to the provisions of the Constitution of the United States.

25. That the rule so applied by defendants to the case described is contrary to law as found in a uniform line of decisions of the Courts,
including the Supreme Court of the United States, construing
12 the general mineral land laws of the United States.

26. That the reasonable value of the possessory title asserted by plaintiffs to the lands hereinabove described as comprising the Wilson No. 3 placer claim is in excess of Five Thousand Dollars ($5,000), and that said title is the thing or matter herein involved.

27. That in the circumstances hereinabove set forth, plaintiff is without any full, adequate and complete remedy at law for the damage and injury threatened by the acts of defendants, and by said threatened action plaintiff seemingly would be left without any remedy whatever, inasmuch as by reason of the terms of the Oil Leasing Act, to which reference was made in Paragraph 22 of this bill of complaint, the Land Department of the United tSates would have no power to convey the legal title to the land herein involved to any third person, into whose hands plaintiff herein might follow it in the effort to have such title impressed with a trust in favor of plaintiff, but it is the design and intent of the defendants that the legal title to said land be retained in the United States, with the end in view of offering to public competitive binding the privilege of leasing said land, upon certain royalties to be reserved to the United States, to occupy, possess, develop and operate said land under said placer mining location and claim, which said location or claim was valid under the applicable rule of law which was in full force and effect at
date of such location, and at all times thereafter, but which
13 rule of law has been ignored and disregarded by defendants
in their decisions hereinabove particularly described.

Wherefore, the premises considered, plaintiffs pray:

I. That process issue out of this honorable court, directed to the defendant, Hubert Work, as Secretary of the Interior, and to defendant William Spry, as Commissioner of the General Land Office, commanding them and each of them, to appear and make answer to this bill of complaint, but not under oath, answers under oath being hereby expressly waived, and to abide by and perform the orders and decrees of this court in the premises.

II. That a rule may issue herein against defendants, and each of them, on or before a certain day, to show cause why they and each of them should not be restrained by a preliminary injunction or restraining order from carrying out or executing any decision reject-

ing the application of plaintiff for a United States patent to said Wilson No. 3 placer claim, pending final hearing of this cause.

III. That upon final hearing of this cause it be ordered and decreed by this honorable court that said defendants and each of them, be permanently enjoined from rejecting said application filed by plaintiff for a United States patent to said Wilson No. 3 placer mining claim upon the ground assigned therefor in the decisions of defendants in this bill of complaint described, and that defendants
14 be enjoined from applying to the consideration of said application for patent any rule as to sufficiency of discovery other than that previously announced and in general force and effect prior to and at the dates of the rendition of said decisions, and that they be commanded to consider, pass upon and determine said application for patent in accordance with said general rule of law, as announced by the Secretary of the Interior in said cases of Castle v. Womble, 19th Land Decisions, page 455, and Kern Oil Co. v. Clotfelter, 30th Land Decisions, pages 583, 587.

IV. Plaintiff further prays such other and general relief in the premises as to this honorable court shall seem meet and proper and as to the exigencies of the case may require.

OREGON BASIN OIL AND GAS COMPANY,
Plaintiff,

By CHAS. F. CONSAUL,
Attorney.

CONSAUL AND HELTMAN,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Chas. F. Consaul, being first duly sworn according to law, deposes and says: that he is one of the duly authorized attorneys for plaintiff in the foregoing bill of complaint; that he has read said bill of complaint and knows the contents thereof; that the allegations in said bill made and contained are true to the best of affiant's knowledge, information and belief; that this bill of complaint is
15 verified by affiant by reason of the fact that no officer or employee of plaintiff corporation is within the District of Columbia, and the apparent exigencies of the case do not permit sending this bill to the State of Wyoming for verification.

CHAS. F. CONSAUL,

Subscribed and sworn to before me this 2nd day of June, A. D., 1924.

[SEAL.] ADELAIDE SPRECKELMYER,
Notary Public, D. C.

16 Oregon Basin Oil and Gas Company.*

Decided October 12, 1923.

Mining Claim—Oil and Gas Lands—Sections 2320 and 2329, Revised Statutes.—The provision in section 2320, Revised Statutes, that with respect to lode mining claims no location shall be made until there shall have been a discovery of the vein or lode within the limits of the claim located, was made applicable to placer mining claims by section 2329, Revised Statutes.

Oil and Gas Lands—Mining Claim—Patent.—A meager showing of oil in a well drilled on a location to a stratum of sand wholly separate and distinct from the underlying formations in which workable oil deposits are expected to be developed within the limits of the claim and in the vicinity thereof does not constitute a valid discovery, and affords no legal basis for entry and patent under the placer mining laws.

Decisions Relating to the Public Lands—Court Decisions Applied—Court Decision Disregarded.—Cases of Bay v. Oklahoma Southern Gas Oil, and Mining Company (73 Pac., 936), United States v. McCutchen, (238 Fed., 575), and Chrisman v. Miller, (197 U. S. 313), cited and applied; case of United States v. Ohio Oil Company *et al.* (240 Fed., 996), disregarded.

17 FINNEY, First Assistant Secretary:

This is an appeal by the Oregon Basin Oil and Gas Company from the decision of the Commissioner of the General Land Office of May 1, 1923, holding for rejection its application 013740, for patent to the Wilson No. 3 oil placer mining claim embracing lots 1, 2, and 3, Sec. 5, T. 50 N., R. 100 W., 6th P. M., Lander land district, Wyoming, on the ground that a valid discovery of mineral has not been shown to have been made within the limits of the claim.

The land, it appears, is included within Petroleum Reserve No. 32 created by Executive order of May 6, 1914. The application for patent was filed October 19, 1922, and is based upon a location alleged to have been made, after discovery, June 9, 1912.

The showing upon which the company bases its claim to a patent to the ground in question is to the effect that during May, 1912, there was drilled upon the land a well 43 feet deep in which at a depth of 38 feet there was discovered a considerable quantity of heavy, greasy oil showing the usual characteristics of petroleum products, and floating upon and mixed with sand pumpings consisting of a mixture of dirt, shale and water extracted from the hole; that in April, 1913, a second well was commenced upon the claim and on the 28th of the same month was completed to a total depth of 434 feet; that the log of said well shows that it was drilled through shale and several sand-

*See decision on rehearing, page 253.

stone members; that, at a depth of 425 feet, oil was encountered in said well from which there was dipped a sufficient quantity of oil to fill a quart bottle; that the bottle was sealed and delivered to the general superintendent of the company performing the drilling on the claim; that said oil was green in color and was present in
18 substantial quantities; that in the judgment of the said superintendent, the oil was of very good trade and such as would be salable if transported to market; that it was present on the land in sufficient quantity to justify the belief that marketable production thereof could be obtained if and when a market should become available; that, in the judgment of the said superintendent and others, the showing justified the further expenditure of time and money with the expectation of developing a paying deposit of oil upon the claim; that the one here in question, lies upon and near the southern end of what is termed the Oregon Basin anticline which extends longitudinally in a north and south direction through the west half of T. 51 N., R. 100 W., and the three sections adjoining it on the north and the south; that the said anticline consists of two domes, one denominated the major dome comprising the S. W. ¼, said T. 51 N., and sections 4, 5 and 6 of the adjoining township on the south, and the other denominated the minor dome comprising the N. W. ¼, said T. 51, and Secs. 31, 32 and 33 of the adjoining township on the north; that the applicant company owns a large number of placer mining claims situated on said dome, including the McMahon, embracing the S. W. ¼, Sec. 32; the Hallene, embracing the S. W. ¼, Sec. 29; the Jack, embracing the N. W. ¼, Sec. 30; the Pauline, embracing the S. E. ¼, Sec. 5, and the Sidney, embracing the N. W. ¼, Sec. 5, all in T. 51 N., R. 100 W.; the Saffold, embracing the N. W. ¼, Sec. 32, T. 52 N., R. 100 W., which six claims last mentioned had been patented; that on August 22, 1912, a well was completed to a depth of 1,322 feet on the McMahon Claim which adjoins the land here in question on the north in which gas was discovered in large volume and under great pressure; that in September,
19 1912, a well was commenced on the Pauline claim situated five miles to the north of the land, and completed to a depth of 2,190 feet January 22, 1913, in which oil and gas in commercial quantities were found, the oil being encountered at a depth of 1,765 feet; that in the fall of 1913, a well was commenced on the Hallene claim situated a mile from the north of the land, and was completed to a depth of 1,632 feet in the spring of 1914; that the result of the drilling of that well was disappointing in that it did not develop oil in paying quantities, but, on the contrary, developed a large flow of gas which, by reason of its heavy rock pressure was almost uncontrollable, entailing much time and expense in attempting to shut off the flow of the gas, through which it was impossible to drill; that in the spring of 1914, a well was commenced on the Jack claim situated a little more than a mile and a half to the northwest of the land in question and was completed October 1, 1914, to a depth of 1,625 feet; that while oil was discovered in that well, it was not found there in large quantity; that the operations on the major dome, however, on which the land in question appears to be situated, developed a

gas field of considerable area under high pressure, with the possibility of oil deposits being found under the gas if it could be penetrated or reduced in pressure by extraction; that in December, 1916, a well was completed to a depth of 1,540 feet on the Sidney claim, situated 5½ miles to the north of the land in question, the result of the drilling of which was another development of gas in large quantity, so great that it was impossible to penetrate it to ascertain whether oil in commercial quantities existed below the gas area and again making it appear that the well had been located too high on the structure of the minor dome; that during the summer of 1917, a well was commenced on the Saffold claim, situated 6½ miles to the north of the land, which well was completed to a depth of 1,779 feet in June, 1918, that both oil and gas were developed in that well the former in commercial quantities, but that the capacity of the well has not been tested on account of the fact that there has been no commercial market for oil that might be produced there because of the lack of pipe lines and other marketing facilities; that the oil is of high grade, and that it seems probable that a satisfactory production can be secured and that with the reduction of the gas pressure from the Pauline and Sidney wells, both located on the minor dome, further oil production may be secured. It appears further that attempts had been made to dispose of the gas produced on the claims named, but had failed for the reason that there is no demand for such product at any place within a reasonably transportable distance from the claim.

In connection with the showing there was submitted a sealed quart bottle marked "Wilson No. 3. Depth 425 feet, Apr. 27/13," nearly full of a dark colored liquid, the lower two-thirds of which appear to be of a considerably higher specific gravity than the upper one-third and which would suggest the possibility that the heavier portion of the liquid is water if the remainder consisted of oil.

The Commissioner, in the decision appealed from, held that the showing made by the applicant demonstrates only that in the wells drilled on the claim in question merely indications of oil were found; that the penetration of a formation saturated with oil, from which one quart of oil was secured, together with the theory that the oil is present on the land in quantity, does not fulfill the legal requirements as to discovery; that to constitute a valid discovery upon a petroleum placer mining claim—

oil or gas in commercial quantities must have been produced, or it must lead to the conclusion that, from the discovery made, it can be produced in commercial quantities on the claim in question.

The showing made was therefore declared to be insufficient to establish the existence of a valid discovery of mineral on the claim, and for that reason, as herein before stated, the application was held for rejection.

The appeal challenges the correctness of the Commissioner's decision on the following stated grounds:

(1) In view of the admitted physical production of petroleum from the well drilled in 1913, at a depth of 425 feet, from which a

sample was then taken, and preserved in a quart bottle, which was produced before the Commissioner, it was error to find that nothing more than *"indications"* of oil were found, i. e., it was error to hold that *petroleum* itself is but an *indication* of petroleum.

(2) It was error to hold that the discovery of petroleum, of which a sample was taken and preserved, did not validate the location, regardless of whether or not the oil deposit so discovered was thereafter developed sufficiently to be commercially productive.

(3) It was error to hold, in effect, that a commercially producing well is a necessary incident to a discovery of petroleum upon a placer claim, i. e., it was error to fail to distinguish between "discovery" as that word is used in the mining law, and the actual commercial production of mineral, whether petroleum or other kinds of mineral, discovery being necessary to the validity of a mining claim, but commercial production not being an essential to such validity.

In the argument submitted both by brief and orally to support the appeal, it is conceded that so far as disclosed the oil deposit
22 actually encountered upon the land possesses no economic importance and that the formations from which the applicant expects to develop commercial oil deposits on the land lie at depths many hundred feet below the formations penetrated by the deeper of the two wells already drilled on the claim and are at present incapable of practical development because of the presence, as disclosed in other places in the Oregon Basin field, of large volumes of gas, under exceedingly high pressure, overlying the deposits sought to be reached. It is urged, however, that regardless of these facts and in view of the further fact that the land has been through its designation by the Geological Survey as being within the limits of the geologic structure of a producing field, in effect, classified as oil and gas in character, the disclosures already made upon and in the vicinity of the land should be accepted as constituting a legal discovery, and as entitling the applicant to a patent to the claim. To sustain that contention the appellant cites the decision rendered January 31, 1916, by the United States District Court, District of Wyoming, in United States v. Ohio Oil Company *et al.* (240 Fed., 996). That was a proceeding wherein the United States sought a decree adjudging and decreeing that the defendants had no right, title, interest or claim to the lands involved, which had been included in a petroleum withdrawal of May 6, 1914, and that all the minerals, including oil and gas, were the property of the United States. The lands, it appeared, had been included in two placer mining locations alleged to have been made about a year prior to the date of the withdrawal, and, as stated by the court in said decision, the plead-
23 ings presented two questions for determination, namely (1) was there a discovery of mineral upon the lands in controversy prior to the date of the withdrawal order; (2) were the defendants at the date of the withdrawal order in diligent prosecution of work leading to the discovery of oil on the claims or either of them, and thereafter continued in the diligent prosecution of such work. The court declared that the affirmative evidence upon the

question of discovery was found in the testimony of those witnesses to the effect that on July 30, 1913, they commenced the drilling of a prospect well on one of the claims and continued it to a depth of 35 feet "and that oil was discovered therein"; that on August 2, 1913, they began the drilling of a well on the other claim and continued the same to a depth of 57 feet, "and that oil was discovered therein"; that two of said witnesses testified "not only to the effect that they found oil, but that the oil found by them was of sufficient quantity and quality to justify a person of ordinary prudence in making further expenditures of money and labor, with a reasonable prospect of success in developing a valuable deposit of oil, and in this view they are sustained by the subsequent development of property." The court declared that that testimony was met only by negative testimony on the part of the Government and that applying the ordinary rules of evidence governing the weight to be attached to affirmative and negative testimony, it felt bound to find that oil was taken from and was found in the test well or wells driven on the land in controversy as testified by the three witnesses for the defendant. The court after a review of a number of cases said (p. 1004):

24 Applying the principles announced in this and other cases (to some of which I have referred) to the evidence in this case, I think the lessors of the defendant the Ohio Oil Company made a sufficient discovery of oil on the claims in controversy to entitle them to make valid locations of the same as placer claims. There can be no question, I think, as to the good faith of these locators, for within a year after the date of discovery two commercial wells were brought in upon these claims at an expense of more than $20,000.

The court, however, while questioning the necessity therefor, further found and held that at the date of the withdrawal of the lands the defendants were *bona fide* occupants and claimants thereof and were engaged in the diligent prosecution of work leading to the discovery of oil in commercial quantities on the land at the date of the withdrawal. It accordingly passed a decree in favor of the defendant.

The case was carried on appeal to the United States Circuit Court of Appeals, 8th Circuit, and was there decided October 13, 1916, under the title United States v. Grass Creek Oil and Gas Company (236 Fed., 481). The appellate court, however, after stating the issues in the case to be substantially as recited in the decision below and in *in* the order named, and declaring that "in view of the conclusions reached, we deem it unnecessary to determine the first issue, as a finding in favor of the defendants on either issue must result in the affirmance of the decree," found and held the claims there in controversy to have been valid on the bases of discoveries made in July, 1914, of oil in commercial quantities in wells drilled to depths approximating 1,000 feet, as the result of the diligent prosecution of work looking to discovery commencing after April 19, 1914, but prior to May 6, 1914, the date of the order of withdrawal. The fact

25 that the appellate court thus deliberately passed over the earlier asserted 1913 discoveries, the question as to the suffi-

ciency of which to support the locations was before it as the first issue, and sustained the validity of the locations solely on the bases of the 1914 discoveries of oil in commercial quantities, would strongly suggest that the court was at least doubtful as to the correctness of the holding of the court below to the effect that the disclosures made upon the claim in 1913, constituted legally sufficient discoveries. Under the circumstances, therefore, the Department is not now disposed to regard the said decision in United States v. Ohio Oil Company as an authority on the question as to what constitutes a legal discovery of oil, and the same will not hereafter be followed by the Land Department.

In the same connection also the appellant cited the unreported departmental decision of October 3. 1918, in United States v. Dudley Oil Company but a far more substantial showing was made there than that relied upon in the present case. The Department, in its decision of October 3, 1919, found that—

The company introduced in evidence a copy of the log of the well and produced seven witnesses familiar with the land. The log showed that in the well, from a depth of 221 feet to 224 feet was encountered a reef, very hard.

From 224 ft. to 239 ft. Starting in oil sand showing high grade oil.

From 239 ft. to 259 ft. Oil and white sand.

From 259 ft. to 264 ft. Through mixed shale.

* * * * * * *

From 420 ft. to 449 ft. Shale and sand showing oil.

26 By the company's evidence it is shown that the well was drilled to the depth of 449 feet before the application was filed, the drilling being done by lessees who were to get an interest (one-half) in the land when patent was issued. At about 230 feet in the well a light gravity oil was encountered. The tools showed oil and oil appeared in the sump. Drilling was continued with the expectation of striking more oil, possibly a gusher. There was a showing of oil at the bottom of the well when drilling ceased. Drilling was stopped because there was developed sufficient oil for patent purposes and on account of expenses, the cost of the well then being about $2,500. Water arose in the well with oil on top to within about 130 feet of the surface. Numerous samples of oil were dipped out, the oil standing 10 to 12 feet in depth upon the water. One of the sample bottles of oil was produced at the hearing. The oil was of a grade worth $1 per barrel at the well. One witness stated that he thought that they had a fifteen barrel well.

To the west of the well within 200 feet upon the S. E. ¼, Sec. 27, was another well with a fine showing of oil at about 230 feet in depth and with 30 feet of oil sand. Patent was issued for that tract. Upon the S. E. ¼, Sec. 35, a well was drilled, with about the same showing and patent issued. On the N. E. ¼ of Sec. 34, a well about 1,200 feet deep showed the same surface oil and two deeper oil sands. That land was patented. From a well in Sec. 25, there was pumped at 150 feet, five barrels of oil per day and from a well on the east

line of Sec. 26 at 210 feet, eight barrels were pumped. That oil was sold for $1.00 per barrel at the well. The quarter section to the north had oil and one witness stated that when he measured it last there was 125 feet of oil standing in that well.

The Department in that case held that taking into consideration the actual showing of oil made in the well drilled, in connection with all the surrounding conditions, it was convinced that a good and sufficient discovery of petroleum to support the location had been made.

It is true that in the later decision of March 13, 1919, rendered on motion for rehearing in the case, the Department cited the decision in United States v. Ohio Oil Company *et al., supra,* to sustain its previous decision of October 3, 1918, but a citation of that decision which, as above stated, the Department does not now
27 see its way clear to follow, was not necessary to a determination of the question involved in the Dudley Oil Company case for it there appeared that an oil-bearing sand shown in a nearby well to be about 30 feet in thickness had been penetrated by the well on the land in question; that oil from such sand had been shown by actual demonstration to have been extracted in quantities expressed in terms of barrel lots; that oil taken apparently from the same deposits or geologic horizon had actually been sold at a well in the immediate vicinity of the land for a dollar a barrel; and that from others of such wells in the same vicinity from 5 to 8 barrels of oil per day had been produced, while the well on the land there in question was estimated to be one capable of producing 15 barrels per day.

As opposed to the said contention of appellant is the decision of the Supreme Court in Chrisman v. Miller (197 U. S., 313), which involved the sufficiency of an asserted discovery to support an oil mining location. The court there declared that even when the controversy is between two mineral claimants "there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious metal, or if it be claimed as placer ground that it is valuable for such mining." The language quoted from said decision was cited in United States *v.* McCutchen *et al.* (238 Fed., 575, 590), and was there construed as having reference to the deposit actually discovered on the claim. It was said:

28 Adopting the conclusion thus announced, there is nothing in the case at bar tending to show that the quantity of gas actually encountered had at the time of its discovery, or at any period up to the time of this trial any appreciable commercial value, or that its presence in the land, in the quantity in which it was found, served to impress upon the land any value at all. In the absence of such showing, in the face of this decision, I do not see how defendants' contentions can be accepted.

To the same effect also is the earlier decision in Bay v. Oklahoma Southern Gas, Oil and Mining Company (73 Pac., 936), wherein the court said (p. 940):

Valuable oil is found by drilling or boring into the interior of the earth, and either flows or is pumped to the surface; and until some body or vein has been discovered from which oil can be brought to the surface, it can not be considered of sufficient importance to warrant a location under the mining laws.

It was there held that a deposit encountered in a well drilled to a depth of 43 feet from which was taken 1½ gallons of oil at one dip with a well bucket did not serve to fulfill the requirements of a valid discovery.

Applying to the present case the principles announced and followed in the three decisions last cited the correctness of which principles has, so far as the Department is able to find, never been questioned by any court in any case involving an oil placer mining claim, except in the above cited case of United States *v.* Ohio Oil Company, the Department is clearly of opinion that the facts disclosed herein fall far short of establishing the existence of a legal discovery of mineral within the limits of the claim in question. The showing herein presented fails to satisfactorily establish that in either of the wells drilled on the claim there was encountered any formation carrying oil or other mineral in sufficient quantity to impress the land with any value on account thereof, while, on the other hand it is conclusively made to appear that the formations from which oil values are expected to be developed within the limits of the claim exist many hundred feet below, and are wholly unconnected with, the formations penetrated in said wells.

29

Nor can the facts that the land may be geologically known to contain at depths formations and sands which have been proved in other fields to be heavily productive of oil; that the land has been in effect classified by the Geological Survey as valuable on account of petroleum deposits; or that above the supposed oil bearing formations there exists within the limits of the claim gas deposits for which at the present time there is no available market, and which, on account of the excessive pressure thereof, can not be sucessfully drilled through in order to reach the supposed oil bearing formations sought, be accepted by the Department as the equivalent of a discovery as urged in the appeal, for, by section 2320, Revised Statutes, it is expressly declared, with respect to lode mining claims, that " no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located", and by section 2329, that claims usually called placers shall be subject to entry and patent only "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

For the reasons herein stated the judgment of the Commissioner is affirmed.

30 Oregon Basin Oil and Gas Company (on Rehearing).

Decided February 1, 1924.

Mining Claim—Oil and Gas Lands.—To support a mining location, the discovery upon which the validity of the location is based must be of the particular deposit actually discovered

within the limits of the claim for the reasonable prospect of the development of which into a valuable mine the evidence warrants further expenditure of time and money.

Mining Claim—Oil and Gas Lands—Evidence—Patent.—The fact that developments outside of a mining location, or that geological deductions indicate the existence within the limits of the claim, but unexposed therein, of deposits wholly unconnected with the deposit actually exposed or discovered, sufficient to warrant expenditures in the development of the claim, does not constitute a valid discovery of mineral upon which to predicate a right to a patent.

Court and Departmental Decisions Applied—Departmental Decision Distinguished.—Cases of Shoshone Mining Company v. Rutter (87 Fed., 801), Nevada Sierra Oil Company v. Home Oil Company (98 Fed., 673), Granlick *et al. v.* Johnston *et al.* (213 Pac., 98), Chrisman v. Miller, (197 U. S., 313), Donnelly v. United States (228 U. S., 243), and Jefferson-Montana Copper Mines Company (41 L. D., 320), cited and applied; case of Castle v. Womble (19 L. D., 455), distinguished.

FINNEY, First Assistant Secretary:

This is a motion for rehearing filed by the Oregon Basin Oil and Gas Company in the matter of its appliication 013740 for patent to the Wilson No. 3 oil placer mining claim embracing lots 1, 2, and 3, Sec. 5, T. 50 N., R. 100 W., 6th P. M., Lander land district, Wyoming, wherein the Department by decision of October 12, 1923 (50 L. D., 244), affirmed the decision of the Commissioner of the General Land Office of May 1, 1923, holding said ap-
31 plications for rejection on the ground that a valid discovery of mineral had not been made within the limits of said claim.

In connection with the motion a supplemental showing has been submitted on behalf of the applicant company and in support of the motion elaborate and able argument, both orally and by brief, has been presented to the Department together with argument in opposition thereto by an intervener.

It is urged in the motion that the Department erred in announcing in the decision complained of a rule wholly out of harmony with that laid down in the case of Castle v. Womble (19 L. D., 455), on the faith of which it is asserted, the applicant acquired title to the claim here involved, and in giving a retroactive effect to what is alleged to be a new rule, which, it is claimed "would have the effect of denying applicant's title, which was good when acquired, under the law as previously announced by the Department and by the courts, and which prior rule constituted a well recognized rule of property."

The Castle v. Womble rule referred to is that—

* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justi-

fied in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

It is argued in the brief filed in support of the motion that under the said rule, good faith being present, but two essential factors are comprehended—(1) the finding of mineral, and (2) evidence that a person of ordinary prudence would be justified in further expenditure of labor and means with a prospect of success in developing a valuable mine, and that the evidence contemplated
32 would include all surrounding, related and material facts not only of what had been found on the claim but on surrounding tracts either by actual operation or by geological examination. It is submitted that with respect to the claim here in question these requirements have been fulfilled; that it is shown (1) that the land in question is mineral in character; (2) that it was located in entire good faith under the placer mining laws of the United States and at a time when it was legally subject to such location; (3) that the location was followed by acts of development such as would naturally be expected of a locator of an oil or gas claim; (4) that continuous possession has been maintained of said claim from 1912 to the present time; (5) that a well was promptly commenced on the claim and was continued until the owners were satisfied of the existence within the limits of the claim of such deposits of oil or gas, or both, as would justify further expenditure of labor and means in the reasonable expectation of developing the claim into a source of commercial production; (6) that the claim constitutes a part of a group of oil placer mining claims held in common ownership; (7) that the showing secured in the well drilled on the claim in question, and on other claims of the consolidated group, was such as clearly induced the owners to expend a large amount of money, to wit, $200,000, up to 1921, in the development of the group; and, (8) that adjoining the claim in question is a placer of the same group held in common ownership, which has been patented by the Government as a valid placer claim.

33 In the decision complained of the Department found that the showing submitted by the applicant failed to establish that in the well drilled upon the claim there was encountered any formation carrying oil or other mineral in quantity sufficient to impress the land with any value on account thereof, while it appeared that the only formations from which workable oil or gas deposits were expected to be developed within the limits of the claim were those that lie many feet below and wholly unconnected with any formation penetrated by said well, such underlying formations, if included within the limits of the claim, being exposed only at places outside thereof. It was held that the meager showing of oil found in the said well at a depth of 425 feet, in a stratum of sand wholly separate and distinct from the underlying formations in which workable oil deposits are expected to be developed within the limits of the claim and in the vicinity thereof did not constitute a valid dis-

covery and hence afforded no legal basis for entry and patent on the application. A careful consideration of the supplemental showing presented in connection with the motion affords nothing that tends to place the claim in any more favorable light than that originally relied upon by the applicant.

The Department is aware of no decision wherein, citing the rule announced in Castle v. Womble, it has ever taken into consideration the proven presence within the limits of a mining claim of deposits not actually and physically exposed therein as a ground for sustaining the sufficiency of an asserted discovery based upon the exposure within the limits of the claim of a deposit that did not
34 warrant or justify the expenditure of time and money with a reasonable prospect of success in the development of a valuable mine on the particular deposit so exposed. On the contrary the Department in its decision of September 5, 1912, in Jefferson-Montana Copper Mines Company (41 L. D., 320), said:

After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be a vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

It is clear that many factors may enter into the third element: The size of *the vein, as far as disclosed,* the quality and quantity of mineral *it* carries, *its* proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether *the vein or lode he has discovered* warrants a further expenditure or not. (Italics supplied.)

In that decision the Department quoted, with significant emphasis, as indicated by italics, which were supplied by the Department, the following from Shoshone Mining Company *v.* Rutter *et al.* (87 Fed., 801):

* * * The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued development *thereon* had resulted in establishing the fact *that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value.*

If any doubt ever existed as to the meaning of the Castle v.
35 Womble rule, that doubt was removed by the decision in Jefferson-Montana Copper Mines Company which specifically points out that the particular deposit actually discovered within

the limits of a mining claim is the one for the reasonable prospect of the development of which into a valuable mine the further expenditure of time and money must be shown to have been warranted by the evidence. The rule thus announced is clearly in accord with the decision of the Supreme Court in Chrisman v. Miller (197 U. S., 313), wherein the court held that to support a mining location—

* * * there must be such a discovery of mineral as gives reasonable evidence of the fact that either there is a vein or lode carrying the precious mineral, or if it is claimed as placer ground, that it is valuable for such mining.

and found that—

* * * There was not enough in what he (Barieau, the defendant's chief witness) claims to have *seen* to have justified a prudent person in the expenditure of money and labor in exploration for petroleum. (Italics supplied.)

And, again, in Donnelly v. United States (228 U. S., 243), the court after briefly setting forth the provisions of the placer mining laws, declared that one of the prime requisites for the acquirement of patent thereunder was "the discovery of a valuable mineral deposit within the limits of the claim," citing in support of that proposition the said case of Chrisman v. Miller. Under the
36 decisions cited, therefore, it would seem to be wholly immaterial that there should be shown by developments outside the claim, or by geological deductions, the existence within the limits of the claim, but unexposed therein, of deposits wholly unconnected with the deposit actually exposed or discovered that would warrant such expenditures upon the claim.

The applicant, however, seeks to have a closed geologic structure shown to be productive of oil or gas regarded as analogous to a mineral bearing vein or lode, and to have applied to physical exposures of mineral, irrespective of actual value, within such a structure, the same rule regarding the sufficiency thereof as a legal discovery as that applied to mineral exposures on veins or lodes. In that connection attention is directed to the decision in Nevada Sierra Oil Co. v. Home Oil Co. (98 Fed., 673), wherein the court, at page 676, said:

* * * As was well said by Judge Hawley in Book v. Mining Co. (C. C. —) 58 Fed. 106, 120, in speaking of vein and lode claims: "When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim."

So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or

upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.

It is urged that by analogy, and with knowledge of the usual geological occurrences of oil and gas, the identical principle may, with reference to oil and gas bearing lands, be reasonably stated as follows:

37 When the placer locator has discovered a closed geological structure, containing the mineral (oil or gas), he has made a discovery within the meaning of the statute, "without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay."

And it is further urged that a recognition of that principle must lead to the adoption of a rule substantially as follows:

Where it appears that an oil or gas placer claim has been located in good faith, upon a structure geologically known to be oil or gas-bearing, or to be favorable to the existence of oil or gas therein, and where it further appears that either oil or gas has been actually found upon the claim, in such quantities, of such quality, and in such manner of occurrence as to justify a reasonably prudent man in futher expenditure of means in developing or exploring the claim, with reasonable expectation of disclosing commercially valuable and productive deposits of these minerals, at greater depth, such discovery, coupled with such favorable surrounding conditions, is sufficient upon which to base a valid location under the placer mining laws, and is sufficient to entitle the owner to a patent, upon compliance with the additional requirements of those laws.

The Department, however, finds no substantial authority for the application of any such rule. On the contrary the same would seem to be out of harmony with the entire theory of the law respecting oil placer mining locations as repeatedly announced by the courts.

For the reasons stated the Department is clearly of opinion that the showing made with respect to the claim here in question is not affected by the Castle v. Womble rule.

The applicant company seeks to establish the similarity between the facts disclosed in the present case and those recited in the Dudley Oil Company's decision explained in the decision here com-
38 plained of, with the substitution, however, of gas for the mineral oil involved in the Dudley Oil Company case. No gas, however, is shown to have been encountered in the well sunk on the claim here in question and the Department is not persuaded that the showings of gas that are alleged to have occurred in wells sunk on other claims in that vicinity at a geologic horizon above the bottom of the well on the claim in question, are entitled to be regarded as establishing a discovery of a valuable gas deposit within

the limits of that claim. The Dudley Oil Company decision, therefore, has no application to the present case.

The motion also alleges that the Department erred in refusing to follow the decision of the United States District Court for the district of Wyoming in United States v. Ohio Oil Co. (240 Fed., 996).

The Department is not only not persuaded by anything urged in the motion or in the accompanying brief that it did so err, but is convinced that its action in that respect finds support in the recent decision of the Supreme Court of Wyoming in Granlick *et al* v. Johnston *et al.* (213 Pac. 98). See also United States v. Donnelly, *supra.*

Upon careful consideration of the motion as a whole, including points not herein specifically discussed, the Department sees no reason to disturb the decision complained of. The same is accordingly adhered to and the motion denied.

Oregon Basin Oil and Gas Company.

Petition for the exercise of supervisory authority denied by First Assistant Secretary Finney, February 21, 1924.

39 Department of the Interior,

Washington.

February 21, 1924.

A 5348. "N." Lander 013740.

Ex Parte: OREGON BASIN OIL AND GAS COMPANY.

Mineral Application Held for Rejection.

Denied.

Petition for the Exercise of Supervisory Authority.

* * * * * * *

The Oregon Basin Oil and Gas Company has filed a petition for the exercise of the supervisory authority of the Department in the matter of its Lander application 013740, for patent to the Wilson No. 3 oil placer mining claim, embracing lots 1, 2 and 3, Sec. 5, T. 50 N., R. 100 W., 6th P. M., wherein the Department by decision of October 12, 1923, adhered to on motion for rehearing February 1, 1924, affirmed the decision of the Commissioner of the General Land Office of May 1, 1923, holding said application for rejection on the ground that an adequate discovery of mineral to support a valid location had not been made within the limits of said claim.

Upon a further consideration of the case in the light of the contentions urged in the petition, the Department is not persuaded
40 that the concrete facts alleged in the affidavits or disclosed by supplemental showing made and filed to support the application as distinguished from the beliefs, opinions, and conclusions of the affiants, and the fact that the land has been designated by

the United States Geological Survey as within the geologic structure of a producing oil and gas field, warrant a holding that a valid discovery of mineral has been made within the limits of the claim.

Nor, in view of the character of the exhibit submitted as evidence in the case to substantiate the assertion of a valid discovery within said limits, which exhibit consists of approximately half a pint of oil and about double the quantity of water and sediment contained in a quart bottle, and alleged to have been taken from the 434-ft. well drilled on the claim, does the Department believe that it would be profitable to order a hearing in the case, as prayed in the petition, for the purpose of affording the petitioner an opportunity to offer oral testimony in the case to establish the matters alleged in the affidavits and contained in the supplemental showing, filed to support the application.

The decisions of the Department complained of are accordingly again adhered to and the petition denied.

(Signed) E. C. FINNEY,
First Assistant Secretary.

41 *Motion to Dismiss.*

Filed March 12, 1924.

* * * * * * *

Come now the defendants by their attorney and move to dismiss the bill of complaint herein filed on the grounds:

1. That, as appears on the face of the bill, the action complained of was taken by the defendants in the administration of public land laws invoked by the plaintiff; that the plaintiff was seeking patent to public land of the United States under the placer mining laws; that the right to receive such patent depends, under the law, upon the validity of a mining location of the land for which patent is sought; that the validity of a mining location depends, among other things, upon a question of fact, i. e., whether the claimants had made a sufficient discovery of the mineral located under their claim; that the determination of such questions and all questions involved in the right to receive patent from the United States is exclusively within the jurisdiction of the defendants and involve the exercise of their judgment and discretion; that in the exercise of this discretion the defendants found and adjudged as a matter of fact that the plaintiff had not made a sufficient and valid discovery of oil such as to entitle plaintiff to a patent for the land; and that the court is without jurisdiction in this case directly to review the finding and determination of the defendants so made.

42 2. That the suit in effect is one against the United States which has not in this behalf consented to be sued.

HUBERT WORK,
Secretary of the Interior;
WILLIAM SPRY,
Commissioner of the General Land Office,
By their Attorney, C. EDWARD WRIGHT.

Order Granting Leave to File Amended Bill and Permitting Motion to Dismiss to Stand Against Same.

Filed June 17, 1924.

* * * * * * *

Pursuant to stipulation of counsel made in open court, it is, this 17th day of June, 1924,

Ordered that plaintiff have leave to file forthwith his amended bill of complaint, and that defendant's motion to dismiss the original bill may be taken, and shall stand, as a motion to dismiss said amended bill of complaint.

By the Court:

WENDELL P. STAFFORD,
Justice.

June 17, 1924.

O. K.
C. E. WRIGHT,
Atty. for Deft.

O. K.
CHAS. F. CONSAUL,
Atty. for Plft.

43 *Decree Dismissing Bill.*

Filed July 7, 1924.

* * * * * * *

This cause came on to be heard on the motion of defendants to dismiss the amended bill of complaint and was argued by counsel; Whereupon, the court being fully advised in the premises, it is, this 7th day of July, 1924,

Ordered, That the motion to dismiss be, and the same hereby is, sustained; and thereupon, plaintiff electing to stand upon his amended bill of complaint, it is, on the day last above written,

Ordered, adjudged, and decreed That the amended bill of complaint be, and the same hereby is, dismissed, with costs to the defendants to be taxed by the Clerk.

By the Court:

WENDELL P. STAFFORD,
Justice.

And now on the day last above written the plaintiff in open court notes an appeal from the aforegoing decree to the Court of Appeals of the District of Columbia, and the same is hereby allowed; the penal sum of the bonds for costs being fixed at $100 with leave to deposit the sum of $50 in lieu thereof with the Clerk of the Court.

By the Court: WENDELL P. STAFFORD,
Justice.

44 *Memorandum.*

July 15, 1924.—$50 deposited by plaintiff's attorneys in lieu of Appeal Bond.

Assignment of Errors.

Filed July 14, 1924.

* * * * * * *

Comes now the Oregon Basin Oil and Gas Company, plaintiff and appellant herein, and in support of its appeal from the decree of the Supreme Court of the District of Columbia, rendered July 7, 1924, dismissing its bill of complaint, assigns error in said decree as follows:

I. Error in holding, in effect, that no cause of action is stated in the bill of complaint, all allegations of the complaint having been admitted by the defendants' motion to dismiss the bill.

II. Error in refusing to enter a decree which should direct defendants to further consider plaintiff's application for patent to its placer mining claim described in the bill of complaint, and which should direct defendants to follow the uniform construction of the mineral land statutes of the United States laid down by the Secretary of the Interior in cases of Castle *v.* Womble, 19 L. D. 455, and Kern Oil Co. *v.* Clotfelter, 30 L. D. 583, and by decisions
45 of the Supreme Court approving said construction, and which construction had become a rule of property.

III. Error in refusing to decree, upon the admitted averments of the bill, that the facts presented by plaintiff to the Secretary of the Interior established as a matter of law, the right of plaintiff to a United States patent to its Wilson No. 3 placer mining claim.

IV. Error in refusing to hold and decree that the locator of a placer mining claim has established a valid possessory title under the mining laws of the United States, other elements of validity being present, by proving that he has actually found within the limits of his mining claim the mineral for which his mining location was made, such mineral being there disclosed in such quantity, and of such quality, and in such manner of occurrence as would warrant a reasonably prudent person in the further expenditure of labor and means in the development of his claim, with reasonable expectation of success in developing a paying mine, taking into consideration what was found upon the claim, and favorable geological conditions known to exist in the vicinity.

V. Error in sustaining as legally correct, and as not arbitrary, the decisions of the Secretary of the Interior whereby he refused to accord probative effect to the testimony of skilled geologists
46 and petroleum operators, that the admitted finding of mineral upon plaintiff's placer claim, with other admitted facts present in this case, were such as to warrant a reasonably prudent per-

son in expending labor and means in development of said placer mining claim, with reasonable expectation of success in developing thereon petroleum or gas in paying quantities; and whereby he refused to allow plaintiff a hearing at which testimony upon this point might be submitted under cross-examination.

VI. Error in dismissing plaintiff's bill on the theory that the suit was one in effect against the United States.

(NOTE.—From the statement of the court, made orally at entering of decree, it would appear that the dismissal of the bill was not placed upon this ground, but no opinion having been filed, plaintiff feels compelled to assign this error in order that the assignments of error may be co-extensive with the defendants' motion to dismiss the bill.)

Respectfully submitted,

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
C.,
Attorneys for Plaintiff, Appellant.

Service of copy of above assignments of error acknowledged this 12 day of July, 1924.

C. EDWARD WRIGHT,
Attorney for Defendants, Appellees.

47 *Plaintiff's Designation of Record on Appeal.*

Filed July 14, 1924.

* * * * * * *

The Clerk is requested to prepare the record herein for the Court of Appeals, and to include therein the following:

1. Amended Bill of Complaint, filed June 17, 1924, with exhibits thereto, consisting of copies of decisions of the Secretary of the Interior.
2. Defendant's motion to dismiss the Bill.
3. Order entered per stipulation June 17, 1924, granting leave to file Amended Bill, and directing that the motion to dismiss the bill shall stand as directed to the Amended Bill.
4. Decree, entered July 7, 1924, with order allowing appeal.
5. Memorandum of deposit of $50 in lieu of appeal bond.
6. Assignments of error.
7. This designation of record.

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
C.,
Attorneys for Plaintiff.

Service of copy of above designation of record on appeal acknowledged this 12 day of July, 1924.

C. EDWARD WRIGHT,
Attorney for Defendants.

48 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 47, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed copy of which is made part of this transcript in cause No. 42258 in Equity wherein Oregon Basin Oil and Gas Company is Plaintiff and Hubert Work, Secretary of the Interior, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington in said District this 25th day of November, 1924.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 4253. Oregon Basin Oil and Gas Company, appellant, vs. Hubert Work, Secy., &c., et al. Court of Appeals, District of Columbia. Filed Nov. 26, 1924. Henry W. Hodges, clerk.

(4702)

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
DEC 29 1924
Henry W. Hodges
CLERK.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1924.

No. 4253.

OREGON BASIN OIL AND GAS COMPANY,
Appellant (Plaintiff below),

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF GENERAL LAND OFFICE,
Appellees.

APPELLANT'S BRIEF

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Statement of Case	1- 4
Assignments of Error	5- 7
Facts Found or Admitted:	
Discussion	7-11
Statement	12-15
Discussion of Case	15
Review of Findings of Fact Not Asked	15
Law of Discovery on a Mining Claim	16-22
Discovery Sufficient to Validate a Mining Location Earns a Patent	23-26
Remedy of Appellant	26-39
This Suit not One Against United States	39-42
Conclusion	42

TABLE OF CASES.

American School of Magnetic Healing v. McAnnulty (187 U. S. 94)	36
Aspen Cons. M. Co. v. Williams (23 L. D. 34, 47)	18
Ballinger v. U. S. (216 U. S. 240)	40
Belk v. Meagher (104 U. S. 279)	25
Book v. Justice M. Co. (58 Fed. 106, 120)	21
Cameron v. United States (252 U. S. 450, 549)	19, 29
Castle v. Womble (19 L. D. 455)	2, 5, 17, 19
Cataract Gold Mining Co. (43 L. D. 248)	18
Chrisman v. Miller (197 U. S. 313)	18, 19
Cole v. Ralph (252 U. S. 286)	18
Cole v. Ralph (252 U. S. 286, 296)	26
Davis v. Weibold (139 U. S. 507)	23
Elliott v. S. P. R. R. Co. (35 L. D. 149, 152)	18
Forbes v. Gracey (94 U. S. 762)	25
Goldstein v. Juneau Townsite (23 L. D. 417, 423)	18
Gwillim v. Donnellan (115 U. S. 45)	25
Holter v. N. P. R. R. Co. (30 L. D. 442, 449)	18
Jefferson-Montana Copper Mines Co. (41 L. D. 320)	18

Page

Johns v. Marsh (15 L. D. 196, 197) 24
Kern Oil Co. v. Clotfelter (30 L. D. 583) 2, 5
Lane v. Hoglund (244 U. S. 174; 44 App. D. C. 310) 33
Lane, Secretary v. Watts (234 U. S. 525; 41 App. D. C. 139) 40, 41
Leach v. Potter (24 L. D. 573, 575) 18
Magruder v. O. & C. R. R. Co. (28 L. D. 174, 177). 18
Manuel v. Wulff (152 U. S. 505) 26
Minnesota v. Lane (247 U. S. 243) 42
Nevada-Sierra Oil Co. v. Home Oil Co. (98 Fed. 673) 20, 21
Noyes v. Mantle (127 U. S. 348) 23, 26
Payne v. Central Pacific R. Co. (255 U. S. 228; 46 App. D. C. 374) 40
Philadelphia Co. v. Stimson (223 U. S. 605) 40
Roberts v. U. S. (176 U. S. 221, 231) 29
Shanks v. Lane (50 App. D. C. 127; 269 Fed. 206). 36
U. S. *ex rel.* Alaska Smokeless Coal Co. v. Lane (250 U. S. 549, 46 App. D. C. 443) 18, 32
U. S. v. Bunker Hill & Sullivan M. & C. Co. (48 L. D. 598) 18
U. S. *ex rel.* Hall v. Lane (48 App. D. C. 279) 37
U. S. *ex rel.* McAlester-Edwards Coal Co. v. Fall 51 App. D. C. 171, 176) 47
U S. v. Ohio Oil Co. (240 Fed. 996; 236 Fed. 481). 21
U. S. *ex rel.* Riverside Oil Co. v. Hitchcock (190 U. S. 316) 38
Union Oil Co. v. Smith (249 U. S. 337, 349) 26
Walker v. S. P. R. R. Co. (24 L. D. 172, 175) 18
Winters v. Bliss (14 L. D. 59, 62) 24
Work, Secretary v. U. S. *ex rel.* McAlester-Edwards Coal Co. (262 U. S. 200, 51 App. D. C. 171; 277 Fed. 573) 28
Work, Secretary v. U. S. *ex rel.* Mosier (261 U. S. 352, 50 App. D. C. 219; 269 Fed. 871) 27
Work, Secretary v. U. S. *ex rel.* Rives (54 App. D. C. 84; 295 Fed. 225) 34
Yard, *et al.* (38 L. D. 59, 70) 18

STATUTES.

	Page
Act of May 10, 1872 (17 Stat. 91)	16
Act of June 25, 1910 (36 Stat. 847)	22
Act of Feb. 25, 1920 (41 Stat. 437) (Oil Leasing Act)	4, 43, 45
U. S. Rev. Stats.	
Sec. 2319	16
Sec. 2320	16
Sec. 2321	16
Sec. 2325	17
Sec. 2329	17

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1924.

No. 4253.

OREGON BASIN OIL AND GAS COMPANY,
Appellant (Plaintiff below),

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF GENERAL LAND OFFICE,
Appellees.

APPELLANT'S BRIEF

STATEMENT OF THE CASE.

This case comes before this Court upon appeal of the Oregon Basin Oil and Gas Company, a Wyoming corporation, from a decree of the Supreme Court of the District of Columbia, dismissing a bill praying injunctive and general relief against the defendants, Hon. Hubert Work, as Secretary of the Interior, and Hon. William Spry, as Commissioner of the General Land Office.

From a reading of the third prayer of the bill it will be noted that the company does not seek to have the courts control any legal discretion of the defendants, but to the contrary, the company asks that defendants be enjoined from rejecting plaintiff's application for patent to the Wilson No. 3 oil placer claim, upon the ground stated by defendants for such action, and that they be enjoined from applying in the consideration of said application for patent any rule as to sufficiency of discovery other than that previously announced and in general force and effect prior to and at date of rendition of the decisions herein complained of, and that defendants be commanded to consider, pass upon and determine said application for patent in accordance with said general rule announced by the Secretary of the Interior in Castle v. Womble, 19 L. D., 445, and Kern Oil Co. v. Clotfelter, 30 L. D. 583, 587, and approved by the Supreme Court.

Defendants filed a motion to dismiss the bill upon two grounds. The first ground, when analyzed, is to the effect that the proposed rejection of plaintiff's application for patent is predicated upon the finding of the fact that no "sufficient" discovery of mineral had been made upon the placer claim involved; that such decision was made in the exercise of defendants' discretion, and is not subject to court review.

The second ground for the motion is that this suit is in effect one against the United States, which has not consented thus to be sued.

After argument, and at the suggestion of the trial court, an amended bill was filed, the amendment consisting principally of appending to the bill copies of the decisions of the Secretary of the Interior; this to place said decisions before the trial court for examination.

Thereafter, the motion to dismiss was granted and decree so entered.

No opinion or memorandum was filed by the trial court, although the reason for the action was stated orally by the Court. In view of the lack of any opinion, it becomes necessary to present the case on the theory that both grounds for the motion to dismiss were sustained.

The gist of this case may be briefly stated as follows:

The Oregon Basin Oil and Gas Company (hereinafter called the company), is the owner by mesne conveyances, of the Wilson No. 3 and other petroleum oil placer mining claims, located in 1911 and relocated in 1912, by citizens of the United States. At dates of said locations, the land was unappropriated, unreserved mineral land of the United States, and was subject to such location.

Subsequently, wells were drilled upon this claim (and also upon adjoining and neighboring placer claims forming one consolidated group). In the first well, at a depth of 45 feet some petroleum was encountered, the petroleum so found inducing the owners to expend further means in drilling a second well, wherein at a depth of about 434 feet, petroleum was found in substantial amount, and of a commercial quality, and from which a sample was then taken.

The company filed application for a patent to this placer claim in the Lander, Wyoming, land office. All steps required were taken up to the payment to the receiver of the land office of the purchase price for the land. The purchase price was refused, and the matter was referred to the Commissioner of the General Land Office, who held the application for rejection for lack

of a valid discovery of mineral to sustain the legality of the mining claim.

Upon appeal, the Secretary of the Interior affirmed that adverse action, in three decisions, the second being on petition for rehearing; the third denying petition for exercise of supervisory authority.

The importance of the question involved arises principally because of the enactment of what is commonly termed the "Leasing Act" of Feb. 25, 1920 (41 Stat. 437), which prohibits subsequent locations upon oil and gas lands under the general mining laws. Hence, appellant must stand or fall according to the validity or invalidity of its placer locations made prior to said enactment.

The case is of even added importance to appellant because of another phase. This land has been "designated" by the Geological Survey as within the known geologic structure of a producing oil or gas field. In view of such "designation," the Land Department would be without legal right under the Leasing Act to permit the company to even lease this land, upon a royalty basis, save by putting the lease up at auction, for bonus bidding. Under such procedure, the company would have to bid against the world for the privilege of further developing this land upon which it has expended a large sum of money, and upon which it has already physically disclosed petroleum—*not mere indications of petroleum*—but the substance itself.

As such action obviously would be in derogation of its rights in the premises the company seeks to enjoin the rejection of its application to patent upon the ground alleged by the Land Department.

Injunction was denied, and the bill dismissed. Hence this appeal.

ASSIGNMENTS OF ERROR.

Presentation of the case in this Court would have been greatly simplified had the trial court filed an opinion making a part of the record its views as announced orally, and dealing with a single point.

I.

Error in holding, in effect, that no cause of action is stated in the bill of complaint, all allegations of the complainant having been admitted by the defendants' motion to dismiss the bill.

II.

Error in refusing to enter a decree which would direct defendants to further consider plaintiff's application for patent to its placer mining claims, described in the bill of complaint, and which should direct defendants to follow the uniform construction of the mineral land statutes of the United States laid down by the Secretary of the Interior in cases of Castle v. Womble, 19 L. D. 455, and Kern Oil Co. v. Clotfelter, 30 L. D. 583, and by decisions of the Supreme Court approving said construction, and which construction had become a rule of property.

III.

Error in refusing to decree, upon the admitted averments of the bill, that the facts presented by plaintiff to the Secretary of the Interior established as a matter of law, the right of plaintiff to a United States patent to its placer mining claim described in its bill of complaint.

IV.

Error in refusing to hold and decree that the locator of a placer mining claim has established a valid possessory title under the mining laws of the United States, other elements of validity being present, by proving that he has actually found within the limits of his mining claim the mineral for which his mining location was made, such mineral being there disclosed in such quantity, and of such quality, and in such manner of occurrence as would warrant a reasonably prudent person in the further expenditure of labor and means in the development of his claim, with reasonable expectation of success in developing a paying mine, taking into consideration what was found upon the claim, and favorable geological conditions known to exist in the vicinity.

V.

Error in sustaining as legally correct, and as not arbitrary, the decisions of the Secretary of the Interior whereby he refused to accord probative effect to the testimony of skilled geologists and petroleum operators, that the admitted finding of mineral upon plaintiff's placer claim, with other admitted facts present in this case, were such as to warrant a reasonably prudent person in expending labor and means in development of said placer mining claims, with reasonable expectation of success in developing thereon petroleum or gas in paying quantities; and whereby he refused to allow plaintiff a hearing at which testimony upon this point might be submitted under cross-examination.

VI.

Error in dismissing plaintiff's bill on the theory that the suit was one in effect against the United States.

(Note. From the statement of the court, made orally at entering of decree, it would appear that the dismissal of the bill was not placed upon this ground, but no opinion having been filed, plaintiff feels compelled to assign this error in order that the assignments of error may be co-extensive with the defendants' motion to dismiss the bill.)

In the absence of such opinion, counsel for appellant are compelled to cover the entire scope of the case as presented by the bill (including the Interior Department decisions) and the motion to dismiss.

FACTS FOUND OR ADMITTED BY SECRETARY OF INTERIOR.

Appellant fully recognizes the general rule that the courts will not review findings of fact made by the Land Department if based upon any legal evidence tending to establish facts so found. We here make no attempt to secure such review. Quite to the contrary, we rely upon the facts as found, with more or less directness, by the Land Department, or pleaded in the bill and admitted by motion to dismiss, and submit that on the facts so found or admitted, the decisions were erroneous as a matter of *law*.

Usually the decisions of the Land Department do not clearly distinguish findings of fact from conclusions of law, by being separated into one part termed "Findings of Fact," and another part termed "Conclusions

of Law." It would probably tend to clarity were such a course followed. However, we are confronted by a condition and not by a theory, and must present the case as made by the record, and not as we might wish it.

The action whereof appellant complains is that taken in three decisions of the Secretary of the Interior; the original decision of Oct. 12, 1923; the decision on review, of Feb. 1, 1924; and decision of Feb. 21, 1924, denying petition for exercise of supervisory authority. In order to ascertain the facts found, it will be necessary to refer to said decisions.

In the first decision, the third paragraph (Rec. 9, 10), 50 L. D. 245, 246, is a finding of facts, the paragraph beginning with the words:

> The showing upon which the company bases its claim to a patent to the ground in question is to the effect that * * *

Then follows a detailed statement of various facts, pertaining to the development work on this particular placer claim, and including also work on other claims of the same consolidated group, which, under the mining law is considered in many respects as constituting one consolidated mining claim. We here quote the facts set forth in this decision, so far as they have direct relation to the Wilson No. 3 placer, as follows (emphasis supplied):

> "The showing upon which the company bases its claim to a patent to the ground in question *is to the effect* that during May, 1912, there was drilled upon the land a well 43 feet deep in which at a depth of 38 feet there was discovered a considerable quantity of heavy, greasy oil showing the usual characteristics of petroleum products, and

> floating upon and mixed with sand pumpings consisting of a mixture of dirt, shale and water extracted from the hole; that in April, 1913, a second well was commenced upon the claim and on the 28th of the same month was completed to a total depth of 434 feet; that the log of said well shows that it was drilled through shale and several sandstone members; that, at a depth of 425 feet, oil was encountered in said well from which there was dipped a sufficient quantity of oil to fill a quart bottle; that the bottle was sealed and delivered to the general superintendent of the company performing the drilling on the claim; that said oil was green in color and was present in substantial quantities; that in the judgment of the said superintendent, the oil was of very good grade and such as would be salable if transported to market; that it was present on the land in sufficient quantity to justify the belief that marketable production thereof could be obtained if and when a market should become available; that, in the judgment of the said superintendent and others, the showing justified the further expenditure of time and money with the expectation of developing a paying deposit of oil upon the claim."

That the statement quoted was intended to be a statement of fact further appears from the concluding portion of the long paragraph (Rec. 11), 50 L. D. 247, where the following language appears (emphasis supplied):

> *It appears further* that attempts had been made to dispose of the gas produced on the claims named but had failed for the reason that there is no demand for such product at any place within a reasonably transportable distance from the claim.

As further showing facts of the case, we call attention to the concluding portion of the first decision (Rec. 16), 50 L. D. 252, as follows:

"Nor can the facts that the land may be geologically known to contain at depths formations and sands which have been proved in other fields to be heavily productive of oil; that the land has been in effect classified by the Geological Survey as valuable on acount of petroleum deposits; or that above the supposed oil bearing formations there exists within the limits of the claim gas deposits for which at the present time there is no available market, and which, on account of the excessive pressure thereof, can not be successfully drilled through in order to reach the supposed oil bearing formations sought, be accepted by the Department as the equivalent of a discovery as urged in the appeal."

In the later decision, on review (Rec. 18), 50 L. D. 254, the Department says:

"It is argued in the brief filed in support of the motion that under the said rule, good faith being present, but two essential factors are comprehended—(1) the finding of mineral, and (2) evidence that a person of ordinary prudence would be justified in further expenditure of labor and means with a prospect of success in developing a valuable mine, and that the evidence contemplated would include all surrounding, related and material facts not only of what had been found on the claim but on surrounding tracts either by actual operation or by geological examination. It is submitted that with respect to the claim here in question these requirements have been fulfilled; that it is shown (1) that the land in question is mineral in character; (2) that it was located in entire good faith under the placer mining laws of the United States and at a time when it was legally subject to such location; (3) that the location was followed by acts of development such as would naturally be expected of a locator of an oil or gas claim; (4) that continuous possession has been maintained of said claim from 1912 to the

present time; (5) that a well was promptly commenced on the claim and was continued until the owners were satisfied of the existence within the limits of the claim of such deposits of oil or gas, or both, as would justify further expenditure of labor and means in the reasonable expectation of developing the claim into a source of commercial production; (6) that the claim constitutes a part of a group of oil placer mining claims held in common ownership; (7) that the showing secured in the well drilled on the claim in question, and on other claims of the consolidated group, was such as clearly induced the owners to expend a large amount of money, to wit, $200,000, up to 1921, in the development of the group; and (8) that adjoining the claim in question is a placer of the same group held in common ownership, which has been patented by the Government as a valid placer claim."

While it may be said that the Department did not explicitly find the existence of the 8 facts therein set forth, yet it it to be noted that they are stated without question as to their existence, and the decision plainly is based upon the hypothesis that the facts are as stated, the conclusion being that, *upon such facts,* the patent must be denied.

Our controversy with the Interior Department does not arise from any difference as to what the material facts. of the case are; it arises wholly from the erroneous action of the Department in applying what the Department conceives to be the law.

In short, on the face of the decisions of the Department, we believe that we may say that either in direct terms or by necessary implication, the essential facts of this case have been found or admitted as below stated.

FACTS EITHER ADMITTED OR FOUND.

1. In 1911, at a time when this land was unappropriated, unreserved mineral public land of the United States, and as such open to placer mineral location, it was located as the Wilson No. 3 oil placer claim by Harrison *et al.*, predecessors in interest of the Oregon Basin Oil and Gas Co., appellant.

See: Par. 3 of Bill (Rec. 2).

2. The usual steps incident to the perfecting of such a placer location were thereafter taken, including marking of boundaries and filing of record in the county land records of the notice of the location, thereafter followed by the drilling of a well upon the claim, which well was completed in May, 1912; that petroleum was encountered in said well at a depth of about 45 feet, "of such amount and quality and of such manner of occurrence as to justify a reasonably prudent person in further expenditure of labor and means upon said land, with reasonable expectation of producing mineral therefrom in paying quantities."

See: Pars. 3 and 4, of Bill (Rec. 2).

3. Following the discovery of petroleum in said well, the locators of said claim made a further location of said claim, in June, 1912, and took the same steps to perfect same, above-mentioned.

See: Pars. 3 and 4, of Bill (Rec. 2).

First decision (Rec. 9).

4. In 1913, the owners of said claim drilled a further well thereon, to a depth of about 434 feet, cased with steel casing, and in which petroleum was found in substantial quantity and of commercial quality, of which a sample was then taken, and which discovery was likewise suffi-

cient to warrant a reasonably prudent man in further expenditure upon said claim, with expectation of developing mineral in paying quantities.

See: Par. 5 of Bill (Rec. 2, 3).

First decision (Rec. 9, 10), 50 L. D. 245.

5. That in addition to performing this work upon said claim, the owners of the claim expended other money in building roads necessary to bring in supplies and equipment, and for the common benefit of this claim and of others held in common ownership, constructed bridges, camp buildings and equipment necessary for continued operations upon this claim and others adjacent thereto; that over $200,000 was expended to secure the systematic and business-like development of all the group of oil placer claims so held in common ownership.

See: Par. 6 of Bill (Rec. 3).

Second decision (Rec. 18), 50 L. D. 254.

6. That the location of this claim and the later steps, were in entire good faith.

See Second decision (Rec. 18), 50 L. D. 254.

7. That since 1912 and to the present, the Oregon Basin Oil and Gas Co., and its privies in interest, have been in the peaceable and undisputed possession of the land involved.

See: Par. 10 of Bill (Rec. 3).

See Second decision (Rec. 18), 50 L. D. 254.

8. That after the discoveries made in 1912 upon the Wilson No. 3 oil placer, and upon similar discoveries made upon said group of placer claims so held in common ownership, the owners of said claims were advised by petroleum geologists and engineers of highest standing and reputation, that said discoveries did warrant and justify the

further expenditure of means with a reasonable prospect of success in developing mineral (oil or gas) in paying quantities; that said owners did actually thereafter expend further means in the development of said Wilson No. 3 and other claims of said group, with the result that petroleum was disclosed in the well drilled upon said Wilson No. 3 placer claim in 1913; and that thereafter further expenditures were also made thereon by said owners.

See: Par. 13 of Bill (Rec. 4).

9. As found in the first decision (Rec. 9, 10), development has been pressed by the company upon its consolidated group of placer claims, with the result that it has been shown that this entire structure or dome is underlain by a gas-bearing formation or stratum, the gas being present in such quantity and under such pressure, as to render it difficult to drill through the gas, into the lower oil-bearing formation known to exist, but not yet drilled into on this land.

10. As further found in the first decision (Rec. 16), the land is "geologically known to contain at depths formations and sands which have been proved in other fields to be heavily productive of oil; that the land has been in effect classified by the Geological Survey as valuable on account of petroleum deposits", and that "there exists within the limits of the claim gas deposits for which at the present time there is no available market, and which, on account of the excessive pressure thereof, can not be successfully drilled through * * *."

11. As mentioned in the preceding paragraph, and as pleaded in Par. 22 of the Bill (Rec. 6), this land has been "designated by the United States Geological Survey, a bureau of the In-

terior Department, as within the known geologic structure of a producing oil or gas field.''

DISCUSSION.

While for reasons previously mentioned, appellant has been compelled to assign errors in such manner as to cover the entire case, we believe that the Court will approve our dividing general discussion of the case under what seem to be the logical heads, rather than under the several assignments of error.

APPELLANT DOES NOT SEEK COURT REVIEW OF ANY FINDINGS OF FACT.

While the motion to dismiss (Rec. 23) asserts that the existence of a *''sufficient''* and *''valid''* discovery is a question of *fact,* the very use of the two words of description quoted from the motion shows that *some rule* must be used in connection with a decision of the question. Plaintiff says that this rule is one of *law,* and that said rule of *law* has been ignored by defendants, their decisions therefore being arbitrary and illegal.

After study of many cases dealing with judicial correction of errors of executive officials, we conclude that the preferable plan will be to first establish the existence of the proper rule of law applicable to the found or admitted facts of this case, and to thereafter consider the remedy of appellant.

LAW OF DISCOVERY ON A MINING CLAIM.

General provisions of the public mineral land law are to be found in various sections of the U. S. Revised Statutes.

These sections are practically as enacted first by Act approved May 10, 1872 (17 Stat. 91), and it is to be noted that the title of said Act is:

> "An Act to promote the Development of the Mining Resources of the United States."

The title is set forth because it declares the policy of Congress toward the discovery and development of minerals upon the public domain. The body of the act is to be read in the light of this declaration.

From these sections we will quote in order to sketch briefly the controlling provisions and requirements of the statutes.

Sec. 2319 provides that:

> All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, * * *.

Sec. 2320 provides that:

> * * * no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * *

Sec. 2321 specifies what shall be filed as proof of citizenship, and includes corporations within scope of the statute.

Sec. 2325 provides that:

> A patent for any land claimed and located for valuable deposits may be obtained in the following manner:
> (Here are set forth in detail the steps to be taken).

Sec. 2329 provides that:

> Claims usually called "placers," including all forms of deposits, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; * * *.

We will first refer to some of the numerous decisions of the Land Department itself on the subject of what is sufficient, *in law*, as a discovery to sustain a mining location.

While not the earliest decision on the subject, the case of Castle v. Womble, 19 L. D. 455, has for nearly thirty years been regarded and cited as the leading case. It was decided in 1894. In that case the Secretary said:

> In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon facts, which in the judgment of the register and receiver and your office, show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed.
>
> After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified

> in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States * * * are * * * declared to be free and open to exploration and purchase."

See also:

> Aspen Cons. M. Co. v. Williams, 23 L. D. 34, 47.
> Goldstein v. Juneau Townsite, 23 L. D. 417, 423.
> Walker v. S. P. R. R. Co., 24 L. D. 172, 175.
> Leach v. Potter, 24 L. D. 573, 575.
> Magruder v. O. & C. R. R. Co., 28 L. D. 174, 177.
> Holter v. N. P. R. R. Co., 30 L. D. 442, 449.
> Elliott v. S. P. R. R. Co., 35 L. D. 149, 152.
> H. H. Yard, *et al.*, 38 L. D. 59, 70.

In case of U. S. v. Bunker Hill & Sullivan M. & C. Co., 48 L. D. 598, decided March 24, 1922, the Department said:

> In connection with the matter of discovery it must not be understood that an actual disclosure of commercial ore is essential to a sufficient and adequate discovery. The principle laid down in the case of Castle v. Womble, 19 L. D., 455, which has been many times cited, is authoritative. See also the case of Jefferson-Montana Copper Mines Co., 41 L. D. 320; Cataract Gold Mining Co., 43 L. D. 248; Chrisman v. Miller, 197 U. S. 313; and Cole v. Ralph, 252 U. S. 286.

The case of U. S. *ex rel,* Alaska Smokeless Coal Co., v. Lane, 250 U. S. 549, 46 App. D. C. 443, is of moment in that it distinguishes between the opening of a *mine,*

and the doing of prospecting work whereby the mineral is *discovered* or exposed. Under the law invoked by claimant, it was required that a mine of coal be opened —not merely that coal be *discovered* on the land—and it was held that mere *discovery* did not constitute the opening of a mine.

Conversely, under the placer mining law, under which plaintiff in the instant case claims, there is no requirement that an actual *producing mine* be opened prior to issuance of a patent, but the statute demands merely that mineral be *discovered,* and by a long line of decisions, if such discovery is sufficient to justify a reasonable prudent person in further expenditure of means with reasonable expectation of *developing* paying mineral, then the patent has been earned.

In the instant case, the Secretary did make precisely the same mistake which the court said he did *not* make in the Alaska Smokeless Coal case.

While relief was denied in that case because of *absence* of error, relief should be granted here because of its presence.

In Chrisman v. Miller, 197 U. S. 313, the case of Castle v. Womble (19 L. D. 455), was cited with approval.

In Cameron v. United States, 252 U. S. 450, 459, in passing upon the assertion of Cameron that in determining whether or not his mining claim was based upon a valid discovery, the Secretary of the Interior had not followed this rule of law, the court said:

> A reading of each decision in its entirety, * * * makes it plain that the Secretary proceeded upon the theory that to support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure

> of his time and means in an effort to develop a paying mine. That is not a novel or mistaken test, but is one which the Land Department long has applied and this court has approved. Chrisman v. Miller, 197 U. S. 313, 322.

That rule simply states a construction by the Land Department and by the Supreme Court of the terms of Secs. 2319 and 2320, U. S. R. S. It is a rule of law which was in force when the Wilson No. 3 placer claim was located, and when title thereto was acquired by deed to plaintiff, in 1919, and which is still the general rule of law applicable; but which rule was disregarded by the Secretary in this particular case.

Now as to some other decisions of the Federal courts on the matter of discovery, approving Castle v. Womble.

The case of Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, was cited by the Secretary in support of his action herein, although the general rule of law laid down in that case is directly opposed to this departmental action. It is true that in said case it was held that the facts *there* disclosed were insufficient to constitute a legal discovery on an oil placer claim, but let us see what the court said in announcing its decision, and in laying down a general rule of law.

It was said that on the land involved and on adjacent land, sandstone and shale had been found; that on one *adjacent* tract a seepage of oil had been found; and that on another *adjoining* tract was a well, producing some oil. Of this condition the court said:

> But this was nothing more than indications of oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not, in my opin-

> ion, sufficient to answer the requirements of the statute, * * *.

Later, after quoting from Book v. Justice M. Co., 58 Fed. 106, 120, to the effect that a lode locator has a valid discovery if he has found a lode, containing mineral, whether rich or poor, the court laid down the following general rule of law as governing oil placer claims:

> So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.

Lindley on Mines (3rd ed. Sec. 437), the leading text on mining law, quotes the above rule, and says of it:

> This is in consonance with the rule announced by the courts in the case of lodes, that neither the size nor richness of the vein is material, so long as there is a genuine discovery. A discovery of such indications as would in a given district lead a miner to the more valuable deposit, according to the experience in that district, would sanction a mining location.

In U. S. v. Ohio Oil Co., 240 Fed. 996, the Government sued the oil company, alleging lack of a valid placer location because of absence of a sufficient discovery prior to date of withdrawal of the land from location, as a petroleum reserve. The company defended by alleging that it had made a sufficient dis-

covery, and that its claim also fell within the protection of the "Pickett Act" of June 25, 1910 (36 Stat. 847), in that it was engaged in diligent prosecution of work at date of withdrawal, which work led to further discovery. If either issue were decided affirmatively, the placer title would be sustained.

The District Court held with the company on each point. On appeal by the Government, the Court of Appeals (236 Fed. 481) affirmed the trial court on the issue of diligent prosecution of work at date of withdrawal, and declined to pass upon the other issue, because its decision of the first issue was determinative of the case.

In that case the facts found by the trial court were that oil was discovered at a depth of 35 feet in one well, and at a depth of 57 feet in another well; neither of said discoveries being in commercial quantities, but sufficient to justify a person of ordinary prudence in further expenditure of money or labor, with reasonable expectation of developing a valuable deposit, thus restating the rule of Castle-Womble.

In the foregoing we have assuredly established that the general rule of law is as set out in the bill, and that said rule was the law before our placer location was made, and thereafter, and down to the present.

On the pleaded and found facts, therefore, we have shown the Wilson No. 3 placer claim to be a valid location, or claim.

Lest it be suggested that ownership of a valid mining claim or location is not in itself sufficient to entitle plaintiff to a patent to its claim, we refer to certain other decisions.

DISCOVERY SUFFICIENT TO VALIDATE A MINING CLAIM IS LIKEWISE SUFFICIENT TO EARN A PATENT.

In Noyes v. Mantle, 127 U. S. 348, it was found that a discovery had been made of a quartz lode, bearing precious minerals, and that discovery was followed by the various acts essential to a mining location. In stating with precision the rights acquired by these acts, the court, speaking by Justice Field, said of the locators (emphasis supplied):

> They were the discoverers of the claim. They marked its boundaries by stakes so that they could be readily traced. They posted the required notice which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of their property. They needed only a *patent* of the United States to render their title perfect, *and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it.*

In Davis v. Weibold, 139 U. S. 507, the court discussed the matter of applications for patents to mining claims, and after citing various decisions of the Land Department, said:

> Rulings to the same effect upon applications for mineral patents are found in decisions of the Department for many years. They are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact.

That statement of law assuredly means that a patent should be granted, under the law, if two elements of proof are present, *i. e.*,

(1) Proof of existence of mineral in the claim.
(2) Proof of justification of expenditure in the effort to obtain it.

In case of Winters v. Bliss, 14 L. D. 59, 62, decided in 1892, the Department stated the rule to be:

> "that mineral patents should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact."

The same language is quoted in Johns v. Marsh, 15 L. D. 196, 197.

These further citations certainly show that, given a valid mining location or claim, it follows that the owner is entitled to a patent to his claim, upon compliance with the proceedings prescribed by the statute, in matter of giving of notice of application, showing expenditure of not less than $500 in labor or improvements upon or for the benefit of the claim, etc.

Hence, it follows that on the facts of the case, viewed in the light of the applicable law, plaintiff has a right to a patent to its Wilson No. 3 placer claim.

It further and necessarily follows, that as a patent has been denied by the Land Department, its action is illegal and arbitrary, and, followed to its logical and ultimate conclusion, would lead to denial of plaintiff's right and title to even the possessory title to said claim.

That would, in turn, mean the illegal deprivation of plaintiff's *property*, without legal warrant, *i. e.*, without due process of law.

A valid mining claim, even though the claim be unpatented by the Government, and the title be a possessory one only, held subject to continued compliance with law, is none the less real estate, and the asserted title or claim to the land, constitutes *property*. Hence, any action which either directly or by necessary effect, operates to deny the validity of such title, is one involving *property*.

In Forbes v. Gracey, 94 U. S. 762, the court considered the nature of unpatented mining claims and said of them:

> Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast states. They are property in the fullest sense of the word, and their ownership, transfer and use are governed by a well defined code or codes of law, and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged and inherited, without infringing the title of the United States.

In Belk v. Meagher, 104 U. S. 279, the court said:

> A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass be descent. Forbes v. Gracey, 94 U. S. 767.

In Gwillim v. Donnellan, 115 U. S. 45, the court said:

> A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located.

See, to same effect:

Noyes v. Mantle, 127 U. S. 348.
Manuel v. Wulff, 152 U. S. 505.
Union Oil Co. v. Smith, 249 U. S. 337, 349.
Cole v. Ralph, 252 U. S. 286, 296.

Summing up under this head of the case, therefore, we have shown:

1. That on the facts of the case, plaintiff has a valid placer mining claim.
2. That plaintiff has earned a patent to said claim.
3. That a patent has been denied by defendants, their action therefore being illegal, arbitrary and unwarranted.
4. That the natural effect of such illegal, arbitrary and unwarranted action of defendants is to deprive plaintiff of its property without warrant of law, and therefore without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

Having established the foregoing propositions, we will now take up for consideration the matter of whether there exists any remedy for this threatened illegal action of defendants.

REMEDY.

A painstaking examination of many decisions in mandamus and injunction suits against officials of executive departments seems to lead to the recognition of a general rule, substantially as follows:

When convinced that executive action is without warrant of law, the courts will use their pro-

> **cess either to prevent perpetration of an illegal act, or to direct the doing of an act required by law to be done.**
>
> **But where the act is one as to doing which the executive has the legal right to exercise his own sound discretion, relief will be denied, on the theory that a discretionary power will not be controlled by the courts.**

It must be said that the application of this general rule to all cases is a matter of difficulty. However, there is no room for doubt but that in the more recent cases, the practice has been to first determine whether the proposed action or failure to act is without warrant of *law*, and in all the recent cases where that point has been decided favorably to plaintiff relief has been afforded.

The recent case of Work, Secretary, v. U. S. *ex rel.* Mosier, 261 U. S. 352, 50 App. D. C. 219; 269 Fed. 871, is pertinent here. In that case it was the duty of the Secretary to pay over to parents of certain minor Indians royalties arising from production of oil from lands belonging to the minors, unless the Secretary should find that the money was not being properly expended for the benefit of the minors.

The Department held that a "bonus" paid in cash in competitive bidding for a lease, was not a "royalty," and that therefore there was no legal duty to distribute bonus money.

In mandamus suit, however, this Court and the Supreme Court, held that the bonus was a portion of the royalty, and that the Department had improperly held otherwise.

It is very significant that the Supreme Court, in considering the case, *first* took up the statute, and deter-

mined its correct construction, and held that the Department had erred in its construction thereof. Having determined the error of the departmental construction, the Court proceeded to determine the *remedy* to be applied.

It was therein held that, as the parents of the minor had not rendered an accounting of the use of payments previously received by them, the mandamus should not issue to compel payment of the bonus money, absolutely, but that the Secretary should be given opportunity to exercise his discretionary power in ascertaining whether funds had been properly expended by the parents for the benefit of the minor, such exercise of discretionary power, however, *to be in accordance with the statutory construction laid down by the Court.*

As is plain, while the writ of mandamus was finally denied in that case, yet the *relief* sought from an erroneous construction of a statute *was* in substance *given.*

The case of Work, Secretary, v. U. S. *ex rel.* McAlester-Edwards Coal Co., 262 U. S. 200, 51 App. D. C. 171; 277 Fed. 573, is also in point. In that case it appeared that by statute the Secretary was directed to cause an appraisement of certain lands; that in certain circumstances, persons were to be allowed to purchase the lands at *"the"* appraised value; that when the relator applied to purchase, the Secretary held the application in abeyance until a new appraisement might be made, whereby the appraised value was increased.

Relator contended that the value of the land as previously fixed by the appraisement directed by the act, should be followed, and not the value fixed by a re-

appraisal. The Court agreed with the contention of relator.

In disposing of the contention of the Secretary that he had a discretionary power in the premises, that it was his duty to construe the law, and that his power to construe should not be controlled by the courts, the following was quoted with approval from Roberts v. U. S., 176 U. S. 221, 231:

> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer."

Citing, also, Work v. U. S. *ex rel.*, Mosier, *supra* (261 U. S., 352).

The case of Cameron v. U. S., 252 U. S. 450, previously cited, was a suit by the United States to enjoin Cameron from occupying land within the Grand Canyon National Monument under title asserted under the mineral laws, by location of a certain mining claim.

The asserted invalidity of the mining location was based on a prior adjudication to that effect by the Land Department, after full hearing and submission of testimony. The relief prayed was granted by the lower courts.

The opinion says that defendant claimed that the decision of the Land Department was erroneous in that the Department misconceived what, *in law*, constitutes a *valid discovery*. The court then proceeded to discuss that assigned error, and said:

> A reading of each decision in its entirety * * *, makes it plain that the Secretary proceeded upon the theory that to support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in the effort to develop a paying mine. That is not a novel or mistaken test, but is one which the Land Department long has applied and this Court has approved. Chrisman v. Miller, 197 U. S. 313.

From the discussion of this legal point by the court it is plain that had it appeared that the action of the Land Department was based upon a *mistaken* conception of the ruling legal principle, the court would have corrected the error of law.

By contrast, then, we ask attention to the fact that in the case at bar, plaintiff has all along contended before the Land Department and here contends, that the Department should have followed the very rule above stated by the U. S. Supreme Court, but that the Land Department, instead, announced a wholly novel and *different* rule, with added requirements, and held to be *insufficient* what the Supreme Court has said *would be* a sufficient discovery to sustain a mining location.

While it is true that, in order to determine the issue of whether or not there was here a valid discovery, the Land Department was called upon to construe the applicable statutes, and to that extent may be said

to possess a discretionary power of a very limited extent and nature, yet when in construing a statute, the Land Department has evidently gone directly contrary to the construction of the same statute previously given by the same Department, and by the Supreme Court, and other courts, it is quite apparent that the error committed is one of *law,* and is therefore one which may be corrected by the courts.

Stated differently, while the Department had jurisdiction of the application of plaintiff for a patent to its mining claim, it was under the duty of exercising that jursdiction in accordance with *law.* If it failed to so exercise that jurisdictional power, then it either exceeded its legal function or failed to fulfill it.

It may be suggested that the Cameron case was a direct suit by the Government, instituted in the courts, and hence all controverted points were before the Supreme Court for determination.

That suggestion, however, can not differentiate that case from the instant case, because in that case Cameron attacked the validity of the Land Department decisions as a part of his defense to the suit, while here we make the same attack, by a direct proceeding, instead of waiting, as Cameron did, until the United States sought to make effective the decisions of the Land Department by court proceedings.

In each case the propriety of the Land Department action, upon the same legal point, was assailed. In the Cameron case the Supreme Court took the point under consideration, and decided it *on its merits,* by holding that the Land Department *did* apply the proper rule of law as to what constitutes a discovery sufficient to validate a mining location, while in the

case at bar plaintiff asserts that a wholly different and contrary rule was arbitrarily laid down and followed by the Department.

The case of U. S. *ex rel.* Alaska Smokeless Coal Co., v. Lane, 250 U. S. 549, 46 App. D. C. 443, is sometimes cited as one against the judicial control of executive action, and at first glance it might appear to be of that nature, but close analysis of the opinion shows that it points the other way, so far as concerns questions of *law* involved in departmental proceedings.

In that case the applicable statute gave the right of purchase to those who had opened or improved a coal mine on public lands in Alaska. The company alleged that it thus earned the right to purchase; but after a hearing at which testimony was submitted, the Department held that no coal mine had been opened or improved, and that the only work done was excavating shallow surface cuts and openings which did not open or improve a coal *mine*. The Department therefore rejected the application to purchase.

The court commented on the apparently painstaking examination by the Department of the evidence from which the conclusion of *fact* had been drawn, *i. e.*, that the work was mere prospecting work, and did not satisfy the demand of the statute that a coal *mine* be opened or improved. On the other hand, the company contended that if coal were disclosed by the work done, the requirements of the statute had been met.

The court said that the company asserted

> "that the Secretary has essentially altered the law by converting the essential terms of it, upon which our rights are based, to terms of another meaning;

> and that that is an arbitrary act which the courts can control and overrule."

The court then said:

> If the accusation were true the conclusion might follow; but the accusation is not true. We rest on this declaration.

That statement by the court plainly means that, *if* the Secretary had misconstrued the law, the case might be considered on its merits, but that there had been no misconstruction of the law. Hence there existed no occasion for mandamus.

If, in the case at bar, the Secretary had found, as a *fact,* that the land involved is agricultural in character and not mineral, or had he found as a fact that *no* mineral had been found on the land, then plaintiff would doubtless have been concluded by such finding; but such is not the case.

Here the *fact is not questioned* that *petroleum was* actually taken from the deeper well drilled on this claim in 1913, but the Secretary has refused to give proper legal effect to the facts.

Hence it follows that the error of which plaintiff complains is one of *law,* and not one of fact. Being such, the error is one of which the courts may properly take cognizance.

In Lane v. Hoglund, 244 U. S. 174; 44 App. D. C. 310, the Secretary had cancelled Hoglund's entry. Under the applicable statute, if no protest or contest had been brought against the entry within two years after date of entry, it was to be deemed valid, and its validity would not thereafter be called into question. It ap-

peared that the report of a deputy forest supervisor was filed within that two-year period, recommending cancellation of the entry, but no proceeding otherwise had been initiated against the entry.

The Secretary urged that the determination of what constituted a pending contest or protest under the statute, was for the Land Department; that such determination involved discretion and judgment, which may not be controlled by the courts; and also that the suit was in effect one against the United States.

The court, however, investigated for itself the question of what constituted a pending contest or protest, and held that the Secretary had misconstrued the law in holding that the adverse recommendation of the field officer constituted a contest or protest.

In a sense it must be admitted that whether or not a contest or protest has been brought is one of *fact,* and in that sense, the determination of the *fact* by the Secretary would be conclusive; but in the light of the court decision, it is plain that what the Secretary deemed to be a contest or protest was not such in *law.* Hence the Secretary's decision was based on error of *law,* and was subject to court review.

So, in the instant case, the refusal of the Secretary to grant a patent to plaintiff amounted to a demurrer by the Secretary to the *legal* sufficiency of *undisputed facts* to constitute a discovery. Hence the error of which we complain was not one of *fact,* but was purely one of *law.* As such it is here subject to review.

The recent decision of this Court in Work, Secretary v. U. S., *ex rel.* Rives (54 App. D. C. 84; 295 Fed. 225), is in point.

In deciding that mandamus suit brought by Rives,

this Court went fully into the merits of the legal point involved, and held that the Secretary had not correctly construed the statute; that under correct construction, the Secretary had the power and was under the duty of allowing the claim, and his refusal so to do amounted to a refusal on his part to exercise a power vested in him by Congress.

In the case at bar plaintiff alleges in effect, by reference to the applicable statutes, that the Secretary of the Interior is under the legal duty to issue a patent to plaintiff to its placer mining claim, because of full compliance with the statutes; but that the Secretary, owing to his misconstruction of the law, on the single point as to what constitutes a valid discovery of mineral upon a mining claim, has refused to fulfill that legal duty, and proposes to reject plaintiff's application for such patent.

In each case the Secretary was called upon, necessarily, to construe a statute, in the Rives case as a preliminary to either allowing a money claim, or to rejecting it; in the case at bar, as a preliminary either to causing patent to be issued to plaintiff, or to rejecting its application for patent.

In the Rives case the courts adjudged that the Secretary had erred in construing a statute, and plaintiff asserts in the instant case that the Secretary likewise erred in attempting to construe the applicable statute.

If interposition of judicial process was proper in the Rives case, then it must be equally applicable in the instant case, *if* in applying the statute, the Secretary erred in its construction.

In principle the two cases are identical, and it is the plain duty of the court to determine for itself whether the Secretary did err in construing the statute.

In Shanks v. Lane, 50 App. D. C. 127; 269 Fed. 206, a suit for injunction, this court said:

> "If there was more than one reasonable construction open to the Secretary when he came to study them, he was free to take the one that appealed most strongly to him and his action in that regard is not subject to the review of the courts until the matter has passed beyond his administrative sphere."

As we have shown, by reason of the construction previously given to the applicable statute, when the Secretary considered the plaintiff's application for patent, there was *not* more than one reasonable construction open to him. The only construction properly open to him was that announced by the U. S. Supreme Court, as well as by the Secretary's predecessors, and that construction he should have followed. His refusal so to do constituted an arbitrary act on his part, against which the Courts may properly give relief.

In American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, it was unquestioned that the Postmaster General had *jurisdiction* of a charge of fraudulent conduct of business through the mails, with power to issue a so-called "fraud order" against one so conducting business. He issued such an order against plaintiff (appellant), but the courts took cognizance of the matter, in order to determine whether the facts of the case brought it within the purview of the statutes conferring jurisdiction on the Postmaster General.

It was held that the *facts* were legally insufficient to

constitute fraud, and hence the adverse action of the Postmaster General was erroneous in *law*.

As showing plainly that the mere circumstance of an executive department having *jurisdiction* is not of itself controlling as preventing court review of an executive action, we quote the following from that case:

> "Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts."

Again, as further showing that the court drew the distinction between a question solely of *fact*, and one of *law*, we refer to the statement (187 U. S., on page 110), to the effect that if the admitted facts showed no violation of law, the determination by the Postmaster General that the law was violated would not be a determination of fact, but one of *law*.

So, if in the instant case the Land Department had found as a fact that plaintiff had not discovered or disclosed or taken any *oil* upon or from the land involved, such determination would have been conclusive; but that was not what the Secretary found or held. His decision was that the admitted disclosure of oil and the taking of oil from the land, were insufficient in *law* to constitute the basis of a valid placer mining location.

Hence, the error complained of was one of *law*, and not of *fact*.

In U. S. *ex rel.* Hall v. Lane, 48 App. D. C. 279, man-

damus was refused, but it was therein stated that the writ would issue in a case.

> "where it was clear that his decision has no basis in the law."

The ground there stated for granting relief is precisely the one on which plaintiff here relies.

As previously intimated, what has been said by the courts in certain cases cannot be reconciled with what was actually *done* in certain other cases. That we freely concede, and rely upon the often mentioned rule that what was said by a court must be construed in connection with the facts of that case, and with what was actually *done*. This because of the well recognized fact that it sometimes happens that language found in an opinion is much broader than the case decided.

One case which in broad terms lays down a rule which since has been often ignored, is U. S. *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

What was actually decided in that case was that the Secretary of the Interior had lawful power to make regulations for the administration of public land laws; that it there appeared that by a certain regulation, a selector under the forest lieu law was required to adduce certain evidence of the non-occupancy of selected land; that the selector had failed to perfect his selection by furnishing the prescribed evidence, and that, *prior* to perfecting the selection, the land was discovered to be valuable for mineral and therefore the selection might not be perfected, the discovery of the true character of the land having been made before any title had vested in the selector.

It is true that in discussing the case, the court said:

> Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of judgment and discretion.
> * * *
> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

As is obvious, a strict adherence to the rule quoted would have precluded the giving of relief in the numerous cases since decided by the Supreme Court. Its application in the terms stated, would leave the executive departments free to adopt and apply entirely erroneous constructions of the law, without possibility of court control.

If there be any irreconcilable conflict between the rule stated in the Riverside case, and what the Supreme Court has actually *done* in later cases, then it is plain that the acts of the court are to be deemed determinative of the instant case rather than what was *said* in an earlier case.

THIS SUIT IS NOT ONE AGAINST THE UNITED STATES.

While the motion to dismiss the bill alleges as one ground that this suit is in effect one against the United States, which has not consented to be thus sued, with all respect to learned counsel for the defense, it is submitted that this standing defense is thrown in for good measure.

It is a stereotyped ground which is quite uniformly interposed in all mandamus or injunction cases against the Land Department. It is seemingly pleaded on the chance that it is impossible to predict that some day, some court, in some case, may not sustain the plea.

Plaintiff's reply to this part of the motion to dismiss will consist of a brief reference to several comparatively recent decisions by the Supreme Court.

In the case of Payne v. Central Pacific R. Co., 255 U. S. 228; 46 App. D. C. 374, the Land Department held that an indemnity selection of public land, made by the company, was of no effect to vest title until after approval of the selection by the Secretary of the Interior. Following that theory, it further held that a withdrawal of the selected land for power purposes, prior to approval of the selection, operated to nullify the selection and rights thereunder, and it was held by the Land Department that the selection must be rejected, although the company had done all acts required of it in order to perfect its rights thereunder.

In that case, decided Feb. 28, 1921, the Court said:

> We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think the suit is one to restrain the defendants from cancelling a valid indemnity selection through a mistaken conception of their authority, and therefore casting a cloud on plaintiff's title.
>
> Ballinger v. U. S., 216 U. S. 240.
> Philadelphia Co. v. Stimson, 223 U. S. 605.
> Lane v. Watts, 234 U. S. 525.

The Supreme Court in that case held that injunction should issue directing disposal of the selection unaffected by the power withdrawal.

In that case, the injunction operated clearly to prevent the Secretary of the Interior from carrying into effect his decision based upon a mistaken view of the *law* applicable to the facts.

That is all that plaintiff asks in the instant case.

In Lane, Secretary, v. Watts, 234 U. S. 525 (41 App. D. C. 139), the Secretary of the Interior and Commissioner of the General Land Office were enjoined from allowing public land entries covering certain land, title to which was found by the court to have passed from the Government to plaintiff's grantor.

In that case the same stereotyped defense was made, that the suit was in effect one against the United States, which had not consented to be thus sued. In reply to that contention, the Supreme Court of the United States said, however:

> The suit is one to restrain the applicants from an illegal act under color of their office which will cast a cloud upon the title of appellees.

In that case defendants asserted that title to the land stood in the United States, and they were planning to dispose of that title to third persons under public land entries. Yet the courts enjoined defendants from proceeding as planned, because, as a matter of *law,* title to the land involved had passed to plaintiff's grantor.

So, in the instant case, plaintiff asserts that it has, by virtue of performance of certain acts, become the owner of *property, i. e.,* a placer mining claim, of value; that not only is it entitled to possession of said claim, but that, under the statutes of the United States, it is also entitled to receive a patent conveying the fee title from the Government.

The facts are not in dispute, but the question in the case is whether or not the facts give rise to a possessory mining title, upon which plaintiff may predicate its demand for a patent.

Plaintiff asserts that in denying the validity of its placer claim, and in denying patent to plaintiff, the defendants have proceeded illegally, and that, instead of complying with the statutes for such cases provided, defendants are in the position of refusing to comply with the statutes, as previously construed by the Department itself, and as also construed by the courts, for such a period that the construction given to the statutes had become a rule of law and of property, beyond the administrative power of defendants to abrogate or ignore.

In Minnesota v. Lane, 247 U. S. 243, the State filed original bill in the Supreme Court, praying injunction against Secretary Lane to prevent his issuing a patent to another claimant. There the Secretary made the usual defense that the suit was in substance one against the United States, but apparently that theory was not given serious consideration as it was but stated and then ignored. The court went fully into the case and held that, the entire matter being still before the Land Department, the State should wait until patent issued, and then pursue its remedy, if any against the patentee.

CONCLUSION.

As will be noted, in some cases involving public land titles, it has been suggested by the courts that, assuming the possible commission of error by the Land Department, the plaintiff might pursue its remedy after issuance of patent to the third person, in a court of equity, for the purpose of securing a declaration of a

trust in favor of the plaintiff. Of course that suggestion, in some cases, would be entirely proper. However, it could have no possible application here, for the very good reason that it is legally impossible that the Government should transfer the fee title to this land to any third person.

The land having been designated as within the known geologic limits of a producing oil or gas field, the only disposal that can be made by the Land Department is by way of a *lease* of the privilege of operating the land for production of oil or gas. The fee title will remain in the Government. Hence no such remedy will ever be open to this plaintiff as that suggested in other cases.

As to this, we refer to Sec. 17 of the Oil Leasing Act of Feb. 25, 1920 (43 Stat. 437), reading as follows:

> Sec. 17. That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same, not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants in areas not exceeding six hundred and forty acres and in tracts * * *, such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½ per centum. * * *

Stated in plain language, the Land Department is placing itself in a position of such obvious inconsistency that it is almost absurd.

It says to the plaintiff company, in effect:

> Get off this land; you have no valid placer claim, because you have no valid discovery of mineral. It is true that you have found petroleum on this claim, but it is not sufficient in amount, as far as disclosed, to validate your mining claim.

And this, although the law, as announced by the Supreme Court, says that a discovery is sufficient if it warrants a person of ordinary prudence in further expenditure of means with reasonable expectation of developing paying mineral.

Hence, under the general legal principle, plaintiff has a good mining claim *if* it has discovered sufficient to warrant further expenditure.

Denial of validity of the mining claim by the Land Department therefore serves to show that, in the opinion of the Department, this land will not warrant further expenditure with prospect of success.

Yet the Department must turn to the public and invite the public to offer bonus bids for the privilege of spending its money on a claim which the Department says, in effect, does not warrant plaintiff company in further expenditure of *its* money.

This is surely blowing hot and cold. If this land is worth spending money on it, and if the finding of petroleum thereon shows that it is, then plaintiff has a valid mining claim to it, and is entitled to a patent. If, on the contrary, no such discovery has been made as proves it to be such as warrants further expenditure, then *why* has the Land Department *"designated"* this land as within the *"known"* geologic structure of a producing oil or gas field?

The designation is not that the land is within the *supposed* or believed geologic structure, but that it is within the *"known"* structure.

How could it be *"known"* as within the geologic structure of a producing field, except by production of oil or gas therefrom? Stated differently, this land could not in the nature of things be *"known"* to be mineral save by the *discovery* of that fact. Plaintiff says it did discover that fact by its drilling operations, on the land, and by actually finding petroleum on the land.

The Land Department says it is "known" that the land is mineral and is on the geologic structure of a producing field, but that the fact has not been *discovered.*

In short, the Land Department says, in substance, that in order to deny patent to plaintiff, the land is considered not to have been *discovered* to be valuable for oil or gas, and hence plaintiff's placer claim is invalid; *but,* for the purpose of later demanding bonus bidding for a lease on the land, the same Department asserts that the land *is known* to be so valuable for oil and gas that the Government is warranted in demanding bonus bidding for the *privilege* of spending money on its development.

We have *no discovery* in view of the Department, but there has been secured a *good enough knowledge* of the mineral value of the land to place it within the operation of Sec. 17 of the Leasing Act.

It may be advisable to here call attention to the circumstances that no "preferential lease," such as is mentioned in Sec. 17 of the Leasing Act, could be secured by the Oregon Basin Company.

Preferential leases are covered by Secs. 18, 18 (a) and 19 of the Act (41 Stat. 437). Application for such leases under Secs. 18 and 19 must be made within six months after approval of that Act (Feb. 25, 1920), and

under Sec. 18 (a) must be made within one year from approval of the Act. Those provisions were designed to cover cases where the mineral locators felt that their rights under the mining laws were questionable, and in effect gave claimants opportunity to compromise with the Government by accepting leases upon surrendering or waiving rights claimed under the placer mining laws.

The Oregon Basin Company made no effort to secure such leases under Sec. 19, because it stood confident that it had good title under the placer mining laws, and therefore there existed no occasion for compromise. That the company was correct was recognized by the Land Department up to the action whereof complaint is here made. This is apparent from the fact that patents were issued for several of the company's placer mining claims forming portions of this same group of claims.

In concluding this presentation of the case, we again ask attention to the phase of the case which makes it imperative that any relief secured by the company be by injunction, because otherwise, there might exist no remedy whatever. This by reason of the Leasing Act which is herein referred to, which directs that land which has been "designated" as within the known geologic structure of a producing oil or gas field, may be disposed of *only* by lease, and that such lease shall be offered at bonus bidding. Hence, the fee title would never be granted by the Government to any third person, who could be sued in equity to secure a decree establishing a trust in favor of the company.

In this respect the case presented differs from most cases involving public lands, and the company occupies the same position described by this court in United

States *ex rel.* McAlester-Edwards Coal Co. v. Fall, 51 App. D. C. 171, 176, in which this court said:

> Unless the relief here sought is granted, appellant company will be left without an adequate remedy to enforce its rights. Unlike cases involving the disposition of public lands, there will be no outstanding conflicting patent which would furnish ground for an action in equity, where the holder of such a patent might be adjudged to hold the title in trust for appellant company.

It is submitted that appellant is assuredly entitled to the protection which only the courts can afford, and which can be given only by injunctive relief in this suit.

Respectfully submitted,

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
APR 21 1925
Henry W. Hodges
Clerk

No. 4253

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1925

OREGON BASIN OIL AND GAS COMPANY, APPELLANT

v.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF AND ARGUMENT FOR APPELLEES

C. EDWARD WRIGHT,
Attorney for Appellees.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1925

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1925

OREGON BASIN OIL AND GAS COMPANY
v.
HUBERT WORK, SECRETARY OF THE INTERIOR, et al.
No. 4253

BRIEF AND ARGUMENT FOR APPELLEES

The land in suit was included in Petroleum Reserve No. 32 on May 6, 1914. On February 25, 1920, Congress passed a law providing for the disposal of the Government's oil deposits by lease instead of under the placer mining law. The act of June 25, 1910, regulating the making of withdrawals and reservations, provided that when oil land was reserved the rights of any *bona fide* occupant or claimant of such land should not be affected or impaired by the order creating the reserve so long as he continued in diligent prosecution of his work. The leasing act protected "valid claims" existent at the date of its passage and thereafter maintained in accordance with the law under which initiated, "which claims may be perfected under such laws, including discovery." But if such a claim included a "discovery" made prior to the leasing act, a perfect claim under the placer mining law would result. The claimant could demand a patent. He might, in

27903—25

certain instances, relinquish and secure a lease under section 18 of the act of February 25, 1920. A placer mining claim or location confers no rights as against the United States unless there be a valid discovery. The Land Department is the sole tribunal to decide that question. It is, of course, a question of fact. The Secretary's decision, in the absence of fraud or imposition, is conclusive. *Cameron* v. *United States* (252 U. S. 450, 464).

Parties with whom appellant claims privity located a placer claim on the land in controversy. They claim a "discovery" of oil at a depth of 425 feet in 1913, which was prior to the creation of the reserve. The so-called location was not developed. About nine years later the appellant, who purchased the locator's claim in 1919, applied for a patent (October 19, 1922), after the leasing act was effective. Regardless of the validity of the claim as excepting the land from the operation of the leasing act, the Secretary was called upon to decide all questions requisite to the issuance of patent under the old placer law. This included "discovery." There was no question about the character of the land. The entire field, of which this location is a very small part, was reserved as oil land as early as 1914. Developments in the neighborhood since then have shown unmistakably that the land is mineral. But the oil-bearing sands which make it mineral are over 3,000 feet below the surface.

The appellant made its showing before the Commissioner. That officer decided (R. p. 11) that the

showing demonstrated only that, in the wells drilled, mere indications of oil were found; that the penetration of a formation from which one quart of oil was secured, together with the theory that oil was present in quantity, is not a fulfillment of the legal requirements as to "discovery"; and to constitute a valid discovery upon a petroleum placer mining claim

> oil or gas in commercial quantities must have been produced, or it must lead to the conclusion that, from the discovery made, it can be produced in commercial quantities on the claim in question.

The showing was declared to be insufficient and the application for patent was rejected. The company appealed to the Secretary. There have been three decisions, all of which are exhibits to the bill and are in the record (pp. 9–23). It would seem that every phase of the matter has been exhaustively considered by the appellees.

It is conceded all around (R. p. 12) that the alleged oil deposit actually encountered, and from which less than a pint of so-called oil was taker., possesses no economic importance. Furthermore, it was conceded that the oil sand formation on the land, which does contain commercial oil deposits, lies at a depth of several hundred feet below this formation from which this small quantity of oil was taken. It is nowhere pretended that the company, on this location, penetrated the real oil sand or stratum which gives the mineral character to this field.

In the first decision, the Secretary after reviewing several decisions including *Chrisman* v. *Miller* (19 U. S. 313), held that "the facts disclosed herein fall short of establishing the existence of a legal discovery of mineral within the limits of the claim in question" (R. p. 16). It was found that the showing failed to establish that in either of the wells drilled on the claim there was encountered any formation carrying oil in sufficient quantity to impress the land with any value on account thereof; while, on the other hand, it conclusively appeared that the formation from which oil values are expected to develop exists many hundred feet below the wells and is wholly unconnected with any formation penetrated by the appellant.

After this decision the appellant came back with a motion for rehearing. In that motion it was urged that the Secretary had laid down a rule out of harmony with the rule in *Castle* v. *Womble* (19 L. D. 455).

At last we have reached the *casus belli*. Appellant's whole case is bottomed upon the proposition that the Secretary gave retroactive effect to an alleged new rule which has the effect of denying its title, which was good under the previous rule laid down in *Castle* v. *Womble* (R. p. 17). That rule, which appellant characterizes as a rule of property, is this:

> * * * where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and

> means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

Appellant's idea of this rule is stated in the record (p. 18). It was urged that under said rule, good faith being present, only two essential factors are comprehended—(1) the finding of mineral and (2) evidence that a person of ordinary prudence would be justified in further expenditure of labor and means with a prospect of success in developing a valuable mine.

If a person digs down 425 feet into the earth and finds half a pint of oil and about double the quantity of water and sediment and cans it in some quart receptacle, while he may say, "Look, I have found some mineral," can it be concluded that this is sufficient evidence to show that a person of ordinary prudence would be justified in going any further? The Secretary decides it in the negative. Appellant apparently appreciated the weakness of such a proposition and contended that the evidence which might properly actuate the locator to proceed would include all surrounding, related, and material facts, not only of what had been found on the claim but on surrounding tracts either by actual operation or by geological examination.

In other words, it is *his* conception of the *Castle-Womble* rule on which he relies, rather than the plain language of the rule itself.

The theory on which the suit is brought is that while the Secretary has jurisdiction to decide whether

the applicant for patent has the essential "discovery," in this case the Secretary, in reaching his decision, abrogated a rule of property, i. e., that while appellant was working on the basis of an established legal definition of "discovery," the Secretary in adjudication applied another definition.

It is our contention that he did not; that appellant never made, and does not now present, a case within the *Castle-Womble* rule; and that tested by that rule itself, he did not make a discovery.

The case of *Castle* v. *Womble* involved a lode mining claim, but its rule is workable in a placer location. A lode claim involves a vein of mineral situate in rock in place. If you discover the vein, and if it is such as to justify further expenditure of time and money in development, you have made a "discovery" within the mining law. It must be a discovery of *the particular lode* which bears the valuable mineral. Placer deposits include mineral deposits not in veins in rock in place. Their form varies with the nature of the mineral. For a long time petroleum did not seem to fit into either class, but by act of February 11, 1897 (29 Stat. 526), Congress permitted entry under the placer mining law. Still, oil deposits are not so closely assimilated in nature to the usual placer deposits. They present points akin to lode deposits in that generally oil is found in an oil sand formation or stratum, which stands in place of rock bearing veins of metal. If a locator opened a vein of no commercial importance whatever, that would not be a "discovery" at the point of opening,

or a discovery of another vein many feet beneath in another rock formation. A discovery of oily substance in sand 425 feet below the surface is not a discovery of the real commercial oil-bearing stratum, or sand 3,000 feet below, the two formations being utterly unconnected or related. The upper sand may have long since been drained, the sample found being merely a remnant, so to speak. In the case at bar the oil which would justify a prudent man in expending labor and money with a prospect of reasonable success in development and production lies more than half a mile below where these locators went. Appellant claims that he tapped a sand 425 feet beneath the surface and took about a half pint of oil. There being no physical or geological connection between the two sands, the point is, Did the finding of this small amount of oil amount to a discovery, as defined in the *Castle-Womble* decision? It was certainly not sufficient to justify spending another cent on the 425 feet sand stratum. That being so, could it amount to a discovery which would fix in the locator a right to obtain patent and to go ahead with further drilling to reach the real oil stratum hundreds of feet below, which he did not discover and whose existence he only knows as a geologic deduction from facts adduced by the efforts or discoveries of others?

The *Castle-Womble* rule in its most liberal application might permit a man to take into consideration the geological condition of the tract and its neighborhood in determining whether the vein or

lode or oil sand *which he discovered* warrants further expenditure in development of that vein or lode or oil sand *which he discovered;* but it has no relation to some vein or lode or oil sand which may be under the surface covered by his location but which he never discovered. All this was explained in the decision in *Jefferson-Montana Copper Mines Company* (41 L. D. 320), a decision quoted on page 19 of the record, rendered prior to either of appellant's alleged discoveries.

This case is, of course, distinguishable from *Castle* v. *Womble* on the facts in that the latter dealt with the mining possibilities of the lode actually discovered while this deals with a valuable mineral deposit in the land elsewhere than at the point of discovery and as to which the alleged discovery had neither practical nor scientific relation. Tested by the rule in that case, however, the appellant has no discovery. No prudent man would be justified in the further expenditure of his labor and means because the sands that the locators claim to have discovered at 425 feet present no reasonable prospect of developing a valuable mine. The appellant has claims elsewhere in the neighborhood, some of which are good and have been patented. But from 1913 the locators did nothing with this particular claim except to sell it in 1919. Since then the Secretary has officially designated the land as within the "known geologic structure of a producing oil or gas field." (R. p. 5.) This was not done because of the alleged discovery on this claim but because of

knowledge elsewhere and otherwise developed—the knowledge of the oil sands half a mile below the appellant's alleged well. Since then the appellant has asked for patent on this location. It does not take a very astute person to see that the company seeks patent, not on the strength of this alleged "discovery" but on account of the fact that the land is situated within a proven field.

Some instructive cases on "discovery" are *Granlick* v. *Johnston* (213 Pac. 98); *United States* v. *McCutcheon* (238 Fed. 575); *Chrisman* v. *Miller* (197 U. S. 313). To quote from these adequately would result in a brief long enough to irritate; and the court undoubtedly would prefer to read the decisions in their entirety. In the *Granlick* case, the court comments upon the decision in *United States* v. *Ohio Oil Company* (240 Fed. 996), cited by appellant. The comments resemble those of the appellee (R. pp. 12–14). The significant fact in that case is that the Appellate Court did not affirm the lower court in its finding that there had been a discovery, but rested its decision on another ground.

These decisions will show that a locator's mental state, i. e., his willingness to go ahead and spend time and money, is not the test. It is for some tribunal to determine whether it is a discovery—whether a prudent man would be *justified* on the evidence in going ahead. Those decisions will also show that finding indications in one stratum is not a discovery of the mineral lying in another stratum.

The bill fails to allege facts that tend to enlighten the court. There are pleader's conclusions enough to be sure. If, however, the court would be disposed to determine for itself the question of "discovery," what facts are alleged in the bill, admitted by the motion, that would enlighten the court at all on this point? Not a single one. Nor yet a single fact by which the court can see that the Department departed from the rule in *Castle* v. *Womble* in deciding the appellant's case. There was no departure.

The case comes to this: The appellee decided a question of fact. He took appellant's own *ex parte* showing. He heard the company again and again. He decided against the company. He may be utterly wrong in his deductions from the evidence. There is no fraud alleged, no imposition. The courts will not review his finding even if erroneous. *Cameron* v. *United States* (252 U. S. 450); *Lane* v. *Cameron* (45 App. D. C. 404); *Smelting Co.* v. *Kemp* (104 U. S. 636); *Steel* v. *Smelting Co.* (106 U. S. 447); *Barden* v. *Railroad* (154 U. S. 288); *Heath* v. *Wallace* (138 U. S. 673).

Finally the court's attention is invited to *New Mexico* v. *Lane* (243 U. S. 52). That case is on all fours in principle with the one at bar. As in this case, the plaintiff there claimed that the Department had reached a conclusion adverse to its claim through the abrogation of a construction of the statute that had become a rule of property. The court held that the suit in substance was one against the United

States and dismissed the bill. In the case at bar title is certainly in the United States. The appellant is an applicant for patent under a law which requires him to establish certain facts, the Land Department being the tribunal with exclusive jurisdiction to determine them. The head of that Department has decided the issue against the appellant. The appellant has now resorted to the courts. Any decree which the court could make in his favor would require the passing of the Government's title to the company. The United States, not the Secretary, would be the loser through the operation of such a decree. Either the company or the United States is to own this oil as a result of the court's decree. The United States is, therefore, the real defendant and this suit is in effect against it, although the Government has not consented to be sued. On this ground alone the court is without jurisdiction and the trial justice very properly granted the motion to dismiss the bill. It is submitted that the decree should be affirmed.

C. EDWARD WRIGHT,
Attorney for Appellees.

○

MR. JUSTICE VAN ORSDEL.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
MAR 2- 1925

IN THE

Court of Appeals, District of Columbia.

January Term, 1925.

No. 4253.

OREGON BASIN OIL AND GAS COMPANY, *Appellant,*

v.

HUBERT WORK, *Secretary of the Interior,* and WILLIAM SPRY, *Commissioner of the General Land Office.*

APPELLANT'S REPLY BRIEF.

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
Attorneys for Appellant.

INDEX OF CASES.

	PAGE.
Bonner *v.* Meikle (82 Fed. 697)	5, 9
Book *v.* Justice M. Co. (58 Fed. 106)	5, 6
Cameron *v.* U. S. (252 U. S. 450)	1, 2
Castle *v.* Womble (19 L. D. 455)	2, 9
Charlton *v.* Kelly (156 Fed. 433; 84 C. C. A. 295)	8, 11
Chrisman *v.* Miller (197 U. S. 313)	6, 14
Erhardt *v.* Boaro (113 U. S. 536)	6
Granlick *v.* Johnston (213 Pac. 98)	14, 15, 16
Kern Oil Co. *v.* Clotfelter (30 L. D. 583)	8
Lange *v.* Robinson (148 Fed. 801; 79 C. C. A. 1)	5, 11
Migeon *v.* Mont. Cen. Ry. Co. (77 Fed. 249; 23 C. C. A. 156)	6
Nev. Sierra Oil Co. *v.* Home Oil Co. (98 Fed. 673)	6
Shoshone M. Co. *v.* Rutter (87 Fed. 807; 31 C. C. A. 223)	6
U. S. *v.* Diamond Coal & Coke Co. (233 U. S. 236)	8
U. S. *v.* Iron Silver M. Co. (128 U. S. 673)	10
U. S. *v.* McCutchen (238 Fed. 575)	13
U. S. *v.* S. Pac. Co. (251 U. S. 1)	8
Wilson *v.* Harnette (32 Colo. 172; 75 Pac. 395)	18

IN THE

Court of Appeals, District of Columbia.

January Term, 1925.

No. 4253.

OREGON BASIN OIL AND GAS COMPANY, *Appellant,*

v.

HUBERT WORK, *Secretary of the Interior,* and WILLIAM SPRY, *Commissioner of the General Land Office.*

APPELLANT'S REPLY BRIEF.

The statements made on the first page of appellees' brief, and the first portion of the paragraph on the second page are correct. However, their correctness can not operate to secure assent to the remainder of the paragraph.

The statement to which we except is as follows, being made with relation to the matter of "discovery" to support a mining claim:

> The Land Department is the sole tribunal to decide that question. It is, of course, a question of fact. The Secretary's decision, in the absence of fraud or imposition, is conclusive. Cameron *v.* United States (252 U. S. 450, 464).

The quoted statement comprises three short sentences, and each sentence contains a misstatement, and a reading of the very case cited in ostensible support of those statements disproves them.

The Land Department is a special tribunal charged with the duty, in cases of application for mineral

patent, to pass upon both the law and the facts, *in the first instance*. However, the case cited by learned counsel for the appellees, shows that the action of the Secretary *is subject to court review* if it appears that the Secretary has misconstrued the *law*, or has failed to follow it, or has gone outside of it.

In asserting that the existence of a valid discovery is "of course, a question of fact," learned counsel begs the question here presented, and seemingly desires to *admit* that the action of the Land Department was correct, and to thereby dispense with further consideration of that point.

In the Cameron case which he cites, the Supreme Court said as plainly as language permits, that *if* the Land Department had applied to the determination of existence of a legal discovery, an erroneous rule of *law*, then its action would be open to review by the courts. In that case it was held that the Department had applied the same old rule which we invoke, laid down in Castle *v.* Womble, 19 L. D. 455, and *for that reason* the action was allowed to stand.

As to the statement in the second paragraph on page 2 of appellees' brief, that this "so-called location was not developed," it is open to construction. If he means to say that it was not developed to *commercial* production, then it is a correct statement. However, it is admitted that it was developed to the extent of drilling a well deep enough to penetrate an oil-sand, in which petroleum was actually disclosed, and of which a *sample* was taken.

Opposing counsel would seemingly have the Court understand that the size of a *sample, taken as such*, is determinative of the extent of the oil deposit from which the sample is taken. Taking a *sample* is not the equiva-

lent of a production test, either in oil development or in other branches of mining. Supposedly *a sample shows quality, not quantity.*

In mining for precious metals, samples are submitted to assay to determine the *richness* of the supposed ore. To test the mine for probable production is quite a different matter, as is obvious.

On page 3 of his brief, counsel for appellees says that it is conceded that the "alleged oil deposit actually encountered, and from which less than a pint of so-called oil was taken, possesses no economic importance."

This statement is one of those half-truths so often found to be misleading. So far as the use of the words "alleged," and "so-called" is concerned, the motion to dismiss the bill admits every material fact pleaded in the bill, so there can exist no proper purpose in thus seeking to question by adroit use of words, the admitted facts.

Seemingly, so far as based on anything appearing in the record, the statement is based in part upon the language used in the departmental decision next after the numbered paragraphs on page 12 of record, as follows (emphasis ours):

> it is conceded that *so far as disclosed* the oil deposit actually encountered upon the land possesses no economic importance * * *.

It does not follow, however, that it has ever been conceded by the placer claimant that the oil-sand actually penetrated may not become commercially productive, with further development. It is conceded that "*so far as disclosed,*" it has not been *proven* to be commercially productive. Further, under the general rule of law to which we call attention in our original

brief, *commercial production* of any kind of mineral, in a mining claim, is not essential to the validity of the mining location.

The averments of the bill, *admitted by motion to dismiss* (rec. 3, par. 5 of bill), are that:

> Petroleum was found in substantial quantity and of a commercial quality, of which a sample was then taken, and which discovery was likewise sufficient to warrant a reasonably prudent man in further expenditure upon said claim, with expectation of developing mineral in paying quantities.

The language of the averment brings the case squarely within the rule of Castle *v.* Womble, 19 L. D. 455, and of court decisions approving that case, and appellees can not now be heard to *deny in argument what they have admitted in their pleading*, as they are here attempting to do.

As demonstrating that the question involved is not one of mere fact, attention is called to the first paragraph on page 4 of appellees' brief, quoting from the first decision of the Department, to the effect that the facts fall short of establishing "a *legal* discovery." That is the very point in issue, and whether or not the admitted *facts* do show a "*legal*" discovery is necessarily a question of *law*.

Before the Department the placer claimant contended that after actually finding mineral on his claim, the locator may rightfully take into consideration all the surrounding and related facts, in determining whether further expenditures are justified in developing the claim.

On page 5 of appellees' brief it is said that this is merely *our construction* of the Castle-Womble rule, but

that the rule contemplates no such reference to surrounding conditions.

As stated in our original brief, while the Castle-Womble decision is regarded as a leading case on the point of discovery, it does not comprise all the law on the subject.

That our contention has substantial basis, and is not evolved for the purpose of attempting to make the law fit our case, will appear from the case of Bonner *v.* Meikle, 82 Fed. 697, 703, decided shortly after Castle *v.* Womble.

While that case involved the validity of a lode claim discovery, it will be noted that on p. 6 of appellees' brief, opposing counsel concedes that the Castle-Womble rule is applicable alike to lode or placer locations. Hence he must likewise concede the pertinence of the Bonner-Meikle case.

In that case the court said (emphasis supplied):

> When a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in *prospecting* and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this *qualification:* that the definition of a lode *must always have special reference to the formation and peculiar characteristics of the particular district where the lode or vein is found.*

Citing Book *v.* Justice M. Co., 58 Fed. 106.

A like rule was stated in the later case of Lange *v.* Robinson, 148 Fed. 801; 79 C. C. A. 1. That case involved the sufficiency of a discovery as basis for a gold-bearing placer location in Alaska. As stated by the Court, the locator went upon the ground, panned for gold and found some fine colors, wholly insufficient

in themselves to be of any commercial importance; valuable gold deposits had been found in a tributary of the same creek, and about a mile distant; in the vicinity gold was usually found on bed rock; where gold had been worked, the bed rock was from 90 to 100 feet beneath the surface; on the claim involved, the bed rock was from 125 to 150 feet beneath the surface. It further appeared that in said district the working of such land was deemed a good business proposition, and that large sums had been expended under such conditions.

After reciting these facts, the court stated:

> It will be noticed from the foregoing statement of facts that prior to making the locations under consideration plaintiff did not actually discover gold in paying quantities upon the claims located; but he did find some small particles of gold thereon. Was this sufficient to give the plaintiff the right to locate as placer mining claims the lands upon which this gold was found?

The court then discussed and quoted from the following cases:

> Book *v.* Justice M. Co., 58 Fed. 106.
> Migeon *v.* Mont. Central Ry. Co., 77 Fed. 249; 23 C. C. A. 156.
> Shoshone M. Co. *v.* Rutter, 87 Fed. 807; 31 C. C. A. 223.
> Erhardt *v.* Boaro, 113 U. S. 536.
> Nev. Sierra Oil Co. *v.* Home Oil Co., 98 Fed. 673.
> Chrisman *v.* Miller, 197 U. S. 313.

and thereafter used the following language:

> There must be some gold found within the limits of the land located as a placer gold claim, but it can not be said in advance as a matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rocks and soil are such as is usually found where these deposits exist in paying quantities; and, further, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent fraud upon the government by persons "attempting to acquire patents to land not mineral in its character." * * *
>
> Our conclusion is that, under the rule stated in the cases to which we have referred, the plaintiff and his grantors made a sufficient discovery of gold upon the lands in controversy to entitle them to make a valid location of the same as placer claims, under the laws of the United States. There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications which at the date of the locations of these claims were known to be valuable for the placer gold which they contained; and the facts, according to the uncontradicted testimony of the plaintiff and of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary.

As will be noted, it was in effect held that, where the locator has actually found *some* mineral on his claim,

it is permissible to show the probable mineral *value* of the claim by evidence as to surrounding conditions, and that if it appears from all the evidence that the land located is such as to justify expenditure for its exploration, with reasonable expectation of success, the law has been met.

That rule, here applied, will show the plaintiff to be entitled to its patent.

As indicating that the Lange-Robinson case was not one standing by itself, we also ask attention to the fact that in the later case of Charlton *v.* Kelly, 156 Fed. 433; 84 C. C. A. 295, the court quoted from it and said (emphasis supplied):

> And we held that, to constitute a discovery sufficient to support the location of a gold placer claim as against another mineral claimant, *it is not necessary that gold must be found in paying quantities*, but that there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location and surroundings.

It is obvious that the courts have construed the same old rule precisely as we have contended it should be construed. Further, the Department has itself laid down a similar construction in case of Kern Oil Co. *v.* Clotfelter, 30 L. D. 583, 587, in which explicit instructions were given that, in determining the oil or non-oil character of land, evidence should be admitted dealing with discoveries on neighboring lands, and with the formation thereof, as well as with the formation of the land involved. To the same general effect, see, also, United States *v.* Diamond Coal & Coke Co., 233 U. S. 236, and United States *v.* Southern Pacific Co., 251 U. S. 1.

From these cases it is plain that counsel for appellant have but followed the law as heretofore authoritatively

announced by the Federal courts and by the Department itself.

As further demonstrating the unwillingness of the Department to follow the established rule as found in its own decisions, and as laid down by the courts, we quote the following from p. 6 of appellees' brief:

> If a locator opened a vein of no commercial importance whatever, that would not be a "discovery" at the point of opening, * * *.

That is the contention of appellees; but compare that with the quoted statement in Bonner *v.* Meikle, 82 Fed. 697, 703, that if the vein discovered bears mineral, sufficient in amount to justify further "*prospecting*" of the claim, whether the vein "is rich or poor, whether it assays high or low," the locator "*has made a discovery* within the meaning of the statute."

The statement quoted from appellees' brief makes it plain that when stripped of verbal trimmings, the real view just now held by the Department is that any mining locator, even of a lode claim, must show a *commercially workable deposit*, else he has no valid discovery to support his claim. That this view is wholly unwarranted is demonstrated by the decisions cited, not only by the Department itself, but by the various Federal courts.

While effort is now made by appellees to show that the Department in this case has not disregarded the rule of Castle *v.* Womble, we call attention to the Department's own construction of its action, shown by the syllabus of its decision (rec. 17), in which it is said that certain court and departmental decisions are cited and applied, the syllabus ending with the significant statement:

> "case of Castle *v.* Womble (19 L. D. 455), *distinguished.*"

Assuredly a case which is "*distinguished*" from that under consideration, is *not* applied or followed. To distinguish a case from the one to be decided is to *refuse* to apply the case distinguished, and that is precisely what we allege in our bill was done by the Department in this case.

On page 7 of appellees' brief, it is asserted, as though it were a proven or admitted fact, that what oil was found in the well on this claim in a sand 425 feet below the surface, would not warrant the expenditure of a cent in further work *on that particular sand*, and hence what was found in that sand was not a legal discovery.

That argument is rather out of line with the statement on page 6 of that brief, to the effect that there is similarity between oil sands or strata and veins of mineral. If such a similarity is to be recognized, then attention is asked to the fact that a lode claim may be located upon discovery of a mineral-bearing *lode*, and that a lode is a generally mineralized mass (not all mineral-bearing, however) which may contain *more than one vein*, just as, in the instant case, we have an oil and gas-bearing formation, comprising more than one sand or bed bearing oil or gas.

In U. S. *v.* Iron Silver M. Co., 128 U. S. 673, the Court in speaking of veins and lodes, said:

> The terms are found together in the statutes, and both are intended to indicate the presence of mineral in rock. Yet a lode may and often does contain more than one vein.

So, if an oil-bearing formation is to be likened to a lode, then it follows that, like a lode, it may have more than one oil bed or stratum, and if the formation (corresponding to a lode) is found, and it contains mineral in sufficient amount to warrant further work, then it

matters not which particular member of that formation (corresponding to a vein) is supposed to contain the greater amount of oil.

In brief, if opposing counsel wishes to discuss the similarity between lodes and oil formations, we are entirely willing to do so, and in that case merely ask application to our case of the same rules which apply to lode claims.

Replying to the argument on page 7 of appellees' brief, to the effect that the placer claimants by striking oil at 425 feet, did not demonstrate the existence of the other oil strata lying below the sand into which the well was drilled, we refer again to the above-cited cases of Lange *v.* Robinson, 143 Fed. 801; 79 C. C. A. 1, and Charlton *v.* Kelly, 156 Fed. 433; 84 C. C. A. 295. In those cases the locators had not struck the bed rock, known to lie from 125 to 150 feet below the surface of the land, and on which bed rock the *commercially* workable gold deposit was supposed to exist; but the court said that the finding of fine colors of gold near the surface, plus known local conditions, was sufficient to constitute a valid discovery. There was nothing to *physically* connect the colors near the surface with the gold on the bed rock lying many feet below, but there was a *logical* connection, even though *not a physical* one. The same is true in the case at bar.

On page 8 of his brief, learned opposing counsel asserts as a fact that

> No prudent man would be justified in the further expenditure of his labor and means because the sands that the locators claim to have discovered

> at 425 feet present no reasonable prospect of developing a valuable mine.

As before suggested, this case is before the Court on bill and motion to dismiss the bill. So far as the facts of the case are concerned, they must be taken from the pleadings, and not from the briefs.

We pleaded in our bill (Pars. 4 and 5, rec. 2, 3), that in the shallow well, drilled in 1912,

> petroleum was encountered * * * of such amount and quality and of such manner of occurrence as to justify a reasonably prudent person in further expenditure of labor and means upon said land, with reasonable expectation of producing mineral therefrom in paying quantities.

And in referring to the deeper well, we pleaded that

> petroleum was found in substantial quantity and of commercial quality, * * *, and which discovery was likewise sufficient to warrant a reasonably prudent man in further expenditure upon said claim, with expectation of developing mineral in paying quantities.

These averments are admitted by the motion to dismiss, yet counsel for appellees seeks to have the Court decide this case upon the *denials* of those averments, *made by counsel, in his brief*. If it were desired to traverse our averments, it should have been done by answer, and not by motion to dismiss. If the case goes back to the trial court with instructions to overrule the motion to dismiss the bill, appellees may then deny any averments of the bill, by a proper pleading; but as the case now comes before this Court, it presents only a question of *law*, as to whether, upon the facts admitted or found, appellant has a good discovery. The Court is not here called upon to determine any controversy as

to facts, because there can be no such controversy on motion to dismiss.

On page 9 of his brief, opposing counsel relies upon cited cases which we feel that we should analyze as briefly as practicable.

U. S. *v.* McCutchen, 238 Fed. 575, was an injunction suit brought by the United States against the McCutchens, it being alleged that the McCutchen location was invalid.

It there appeared that the McCutchens had drilled two dry holes, and thereafter rested until others had gone upon the land and at heavy expense had developed oil in large commercial amounts.

The other material facts were as follows:

> 1. The only discovery there alleged was of gas, and even that was not mentioned until an amended answer was filed thus indicating that the assertion was a second-thought matter.
>
> 2. While the blank form on which the log of the wells was kept from day to day included a space for mentioning any gas found, that space was left blank in the log, thus further indicating that none was ever found.
>
> 3. While some witnesses testified that gas was found, only one asserted that he saw it lighted; another thought he smelled it, and another thought he saw it, and one was disbelieved by the court.
>
> 4. On the other hand, a mining engineer examined the wells for a prospective purchaser of the claim, and in his report made no mention of any gas.

On this evidence the court held that, at any rate, the placer claimants were not led by what they said they discovered, to make any further expenditure, as they rested until others proved the oil value of the land. It is plain from careful study of the McCutchen case that

nothing had been found in the wells, and failure of these claimants to proceed further certainly did *not* indicate good faith or any confidence in the value of the claim. On both these points, the instant case is in contrast with that one, for here we have good faith, and diligence in developing the group of adjoining placer claims, which obviously could not all be drilled simultaneously.

The McCutchen case is not at all pertinent here.

Counsel for appellees cites Chrisman *v.* Miller, 197 U. S. 313, as sustaining his position. Of course, it is true of court decisions as of the bible, that one may find statements therein which will sustain almost any theory, if not read with the context.

In that case the Supreme Court said that it would *not* go back of the findings of the lower courts on the *facts*, and among the facts so found were the following:

> 1. That the Chrisman oil placer location was *not made in good faith.*
> 2. That *no oil* had been found on the claim.
> 3. That Chrisman never took or held possession of the land under his pretended placer location.

Surely those facts distinguish the Chrisman case from ours. While Chrisman found *no oil* on the land, *we did* find it. While Chrisman's location was *not* made in good faith, *ours was so made.* While Chrisman never was in possession under his location, we and our privies in title have been in the exclusive, peaceable possession of this land since 1911. Examination of the Chrisman case, instead of showing it to be a precedent for the instant case, proves that it is wholly different.

Counsel for appellees also cites Granlick *v.* Johnston, 213 Pac. 98, but examination of that case will show that

it could not be deemed at all controlling of the case at bar.

In that case Granlick and associates located an oil placer claim, and with a 2-inch auger bored a hole 20 feet deep; then water was poured into the hole and after a few days was pumped out, and it was testified that on top of the water was a color of oil. Thereafter nothing was done by the locators until after a conflicting location was made. Then a shanty was placed on the claim by Granlick *et al.*, but no drilling was done by them. Meanwhile, Johnston *et al.*, drilled a well to a considerable depth and secured actual production of oil.

On these facts it was held that Granlick *et al.*, had made no such valid location as would preclude the making of the conflicting location, no physical occupation having been maintained by Granlick *et al.*

It will be observed that the history of work on the Granlick claim was similar to the first part of the history of the Wilson No. 3 claim, here involved, in so far as the Granlick claim was drilled to 20 feet with an auger, and the Wilson No. 3 claim was drilled to a depth of 43 feet, in which a showing similar to that on the Granlick claim was found.

At this point, however, all similarity between that case and ours ceases, for in our case we did expend further money and drilled the 434-foot well and therein actually found oil and took a sample therefrom, and, as set out in the Departmental decision (rec. 18) on the consolidated group of claims the claimants were induced to expend about $200,000.

In short, when compared, our case and that of Granlick *v.* Johnston possess only one similarity, but have many points of difference. That case is not at all applicable to the one at bar.

Here are the two cases:

Granlick-Johnston	Oregon Basin
1. Colors of oil found in a hole 20 feet deep.	1. Colors of oil found in a well 43 feet deep.
2. No further drilling done.	2. A second well drilled 434 feet deep, from which oil was actually produced, and found in substantial quantity.
3. No attempt to retain possession under placer location until long after an adverse location had been made.	3. Continuous, actual and peaceable possession maintained from 1911 to present time.
4. No further expenditure save incident to putting a shanty on the land, after adverse location by Johnston *et al.*	4. On consolidated group of claims including claim involved, a total of $200,000 expended prior to 1921.

It will be also noted that the Granlick-Johnston decision did not criticize or refuse to follow the decision of Judge Riner in U. S. *v.* Ohio Oil Co., 240 Fed. 996, as intimated by opposing counsel, the rule of law being laid down as follows (emphasis supplied):

> * * * we may safely say that the sum of all the authorities is that a discovery of slight seepage of oil from surface formation, *as in this case*, does not *necessarily* establish a discovery within the meaning of the mining laws.

Learned counsel for appellees is welcome to all the help that he can find in that case.

In the first paragraph on page 10 of appellees' brief it is said that the facts pleaded are insufficient to bring this case within the rule of law for which we contend. Knowing as we do the general fairness of opposing counsel, we must express our surprise at such a statement being made.

Aside from any other portions of our bill, facts are succinctly pleaded in paragraphs 4 and 5 (rec. 2, 3) in practically the precise language of the rule in Castle *v.* Womble, 19 L. D. 455. We pleaded that in our first well petroleum was encountered of such amount and quality and of such manner of occurrence as to justify a reasonably prudent person in further expenditure of labor and means with reasonable expectation of producing mineral in paying quantities. We pleaded the same fact of discovery in our second well. *The motion to dismiss admitted those facts.*

This contention of appellees, apparently goes with the statement in the last departmental decision (rec. 22), in which the Department practically says that it has refused to accord any weight to the sworn statements of petroleum engineers, and practical oil men, to the effect that the oil actually found *does* justify further expenditure, under the rule of Castle *v.* Womble.

Concededly, whether or not a discovery justifies further expenditure must be determined from the evidence. If the evidence all points one way, however, then a refusal by the Department to follow the evidence amounts to a *substitution* of the Department's own *opinion for the evidence.*

That in itself would constitute such an arbitrary act as the courts should review. Cases are supposed to be decided on the *evidence,* and not according to any personal notion of the official charged with the decision.

On the matter of justification of further expenditure we proved our case in the only manner open to us, i. e.,

by affidavits. As will appear from the last departmental decision (rec. 23), we prayed a hearing at which testimony might be adduced under cross-examination, *but that request was denied by that decision.* We could do no more, and are therefore entitled to a decision on the evidence before the Department, and which evidence has been disregarded.

In case of *Wilson* v. *Harnette*, 32 Colo. 172, 75 Pac. 395, the validity of a discovery was involved. At the trial practical miners were asked whether, in their judgment as miners and prospectors, the discovery was such as a reasonably prudent person would be justified in following with an expenditure of time and means with the hope of finding mineral in paying quantities. It was held by the State Supreme Court that this was proper testimony on the issue of discovery, and that in the very nature of the issue, expert opinions must be relied upon, as the matter of justification of expenditure could not be a matter of common knowledge.

The same principle is laid down in Lindley on Mines (3d ed.) Sec. 336, as follows:

> There is a material difference between a discoverer being *willing* to spend his time and money in exploiting the ground and being *justified* in doing so. The former is a question to be answered by the miner himself; the latter would present a question for expert testimony and determination by a jury. (Citing Burke *v.* McDonald, 2 Idaho, 1022; 3 Idaho, 296; 29 Pac. 98.101.)

Of course expert testimony or the testimony of skilled observers, is made up in part of their opinions, but that does not detract from the admissibility or weight of their testimony, and if all the testimony is in the affirmative, the Secretary of the Interior is wholly without legal right to disregard that evidence.

Viewed from that standpoint, therefore, the decision was an arbitrary one, not based upon the evidence at all, but squarely in disregard thereof. Of such official action by an executive department, the courts will take cognizance for the purpose of correcting the legal wrong done the citizen.

As to the jurisdiction of the courts in such a case as is here presented, we refer to our original brief (under the head of REMEDY, p. 26, *et seq.*).

CONCLUSION.

On page 11 of appellees' brief it is said that any decree passed in favor of the placer claimant would require the passing of title from the Government to the plaintiff. While it is needless to say that we expect that to be the ultimate effect of a proper decree, that result can follow only if plaintiff is rightfully entitled to a patent.

What plaintiff asks at the hands of this Court is that appellees be enjoined from rejecting the application for patent on the grounds set up in their decisions. We have not asked a mandatory injunction directing issuance of a placer patent, but have asked the interposition of the courts only to prevent the taking of action which is contrary to law.

We may frankly say that we believe the ultimate result will be the issuance of patent, because the only objection raised by the Secretary to issuance of patent is on the matter of discovery, and once the Secretary is set right on that point, then on the face of the case, patent will issue. We make this statement because we entertain no doubt that the Secretary will proceed in

good faith to consider the application for patent in accordance with what we believe the courts should lay down as a proper rule to be followed concerning discovery.

The entire record of this case as made up in the Land Department indicates that the Department regards the term "discovery" as a sort of shibboleth, a word of magic properties, and that the underlying reason for demanding a discovery has been entirely lost to sight.

The theory of the law in demanding that a mining locator make a discovery is that he must prove the land to be mineral in character, and that he is not seeking title to non-mineral land under guise of compliance with the mineral laws. The making of a discovery also goes to the good faith of the locator. The rule which has been so often stated distinguished a *bona fide* prospector from a mere speculator. Under this rule, however, once the locator has actually found mineral *upon* his claim, he may properly consider all surrounding conditions in reaching a conclusion as to whether what he has found justifies further expenditures.

That is the reason of the rule. To demand evidence that the mine may be now worked at a profit, or that further development will with certainty bring commercial returns, is to go far beyond that reason.

Mr. Lindley, in his work on Mines, Sec. 336, says:

> To hold that, in order to constitute a discovery as the basis of the location, it must be demonstrated the the discovered deposit will, when worked, yield a profit, * * *, would be to defeat the object and policy of the law.
>
> * * * * * * * *
>
> No court has ever held that in order to entitle one to locate a mining claim ore of commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible.

While counsel appreciate the law is to be found in statutes and decisions, rather than in text books, the above is taken from a work which has been quoted with approval by many courts, including the Supreme Court of the United States.

The Oregon Basin Oil and Gas Company seeks no special consideration at the hands of the Interior Department; it invokes no novel principle of law. To the contrary, it asserts that the Secretary of the Interior has failed and refused to apply to a consideration of this application for patent that construction of the law heretofore announced and followed by the Department itself and by the courts, and which construction has been so long followed that it has become a rule of property, not lightly to be upset by an executive department of the Government.

It was a rule of property on faith in which title to this claim and others of the same group was initiated by the locators, and under which that title was thereafter acquired by the applicant company.

Congress has not changed that law, and the construction thereof should not be now changed in order to defeat appellant's application for patent to its placer claim.

We ask that legal landmarks which define the extent of our rights under the mining laws be not moved, and that the Secretary of the Interior be enjoined from moving them for the purpose of diminishing the rights of the company, asserted under the law.

Respectfully submitted,

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
Attorneys for Appellant.